Supreme Court of the United States

OCTOBER TERM, 1966

No. 176

UNITED STATES, APPELLANT

vs.

LEE LEVI LAUB, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 64CR 350

(T. 18 U.S.C., § 371.)

[File Endorsement Omitted]

UNITED STATES OF AMERICA

against

LEE LEVI LAUB, PHILLIP ABBOTT LUCE, ELLEN IRENE SHALLIT, ALBERT LASATER MAHER, ROGER JAY TAUS, MARTIN ALBRECHT NICOLAUS, MICHAEL DAVID BROWN, CHRISTIAN LEE RAISNER and PATRICIA ANN SOPIAK, DEFENDANTS

INDICTMENT—Filed September 22, 1964

THE GRAND JURY CHARGES:

1. That from in or about August, 1963 and continuously thereafter up to and including the date of this indictment, at which time there was in force and effect a state of national emergency proclaimed by the President of the United States, in the Eastern District of New York and elsewhere, LEE LEVI LAUB, PHILLIP ABBOTT LUCE, ELLEN IRENE SHALLIT, ALBERT LASATER MAHER, ROGER JAY TAUS, MARTIN ALBRECHT NICOLAUS, MICHAEL DAVID BROWN, CHRISTIAN LEE RAISNER and PATRICIA ANN SOPIAK, the defendants herein, did unlawfully, willfully and knowingly conspire and agree together, and with each other and with divers other persons to the Grand Jury unknown, to violate Title 8 United States Code, § 1185(b) and the regulations thereunder, to wit: 22 C.F.R. 53.2 and 53.3, in that they did unlawfully, willfully and knowingly conspire and agree to induce, re-

cruit and arrange for a number of American citizens to depart from the United States for the Republic of Cuba, without bearing a valid passport for the Republic of Cuba, that Republic being a place outside of the United States for which a valid passport is required under the aforesaid regulations.

2. It was part of the said conspiracy that the defendants would form a committee to promote and to accomplish travel from the United States to Cuba.

3. It was further a part of the said conspiracy that the defendants would act as regional representatives in various parts of the United States to promote travel from the United States to Cuba.

4. It was further a part of the said conspiracy that the defendants would attempt to recruit other persons to depart from the United States for Cuba without bearing valid passports.

[fol. 2] 5. It was further a part of the said conspiracy that the defendants would correspond with such persons aforesaid in connection with their travel to Cuba.

6. It was further a part of the said conspiracy that the defendants would solicit a deposit from such persons aforesaid to help defray the expenses of their travel to Cuba.

7. It was further a part of the said conspiracy that the defendants would ask the aforesaid persons to conceal their ultimate destination.

8. It was further a part of the said conspiracy that the defendants would not reveal the original date of departure from the United States, nor the route to be taken to Cuba.

9. It was further a part of the said conspiracy that these persons traveling to Cuba would go by way of Europe in order to conceal their ultimate destination.

In pursuance and furtherance of the said conspiracy and to effect the object thereof, the defendants did commit among others in the Eastern District of New York and elsewhere, the following

OVERT ACTS

1. On or about October 5, 1963 the defendant PATRICIA ANN SOPIAK spoke at a meeting in Detroit, Michigan.

2. On or about November 20, 1963 the defendant LEE LEVI LAUB spoke at a meeting at the University of Connecticut, in Storrs, Connecticut.

3. On or about November 21, 1963 the defendant PHILLIP ABBOTT LUCE spoke at a meeting at the University of Rhode Island in Kingston, Rhode Island.

4. On or about March 21, 1964 the defendant MICHAEL DAVID BROWN conducted an interview in Ann Arbor, Michigan.

5. On or about March 30, 1964 the defendant CHRISTIAN LEE RAISNER issued a receipt for $10 in San Francisco, California.

6. On or about April 30, 1964 the defendant ELLEN IRENE SHALLIT issued a receipt for $10 in New York City, New York.

7. On or about June 30, 1964 the defendant LEE LEVI LAUB traveled to the John F. Kennedy International Airport, Long Island, New York, within the Eastern District of New York.

8. On or about June 30, 1964 the defendant PHILLIP ABBOTT LUCE travelled to the John F. Kennedy International Airport, Long Island, New York, within the [fol. 3] Eastern District of New York.

9. On or about June 30, 1964 the defendant ROGER JAY TAUS traveled to the John F. Kennedy International Airport, Long Island, New York, within the Eastern District of New York.

10. On or about June 30, 1964 the defendant ALBERT LASATER MAHER traveled to the John F. Kennedy International Airport, Long Island, New York, within the Eastern District of New York.

(In violation of Title 18 United States Code, § 371.)

A TRUE BILL:

/s/ Emil C. Zimmerman
Foreman

/s/ Joseph P. Hoey
United States Attorney
RBL

[fol. 243]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

[File Endorsement Omitted]

[Title Omitted]

BILL OF PARTICULARS—Filed April 29, 1966

Pursuant to the order of the Honorable Joseph C. Zavatt, Chief Judge, United States District Court for the Eastern District of New York, entered the 29th day of April, 1966, the Government herewith serves and files its Bill of Particulars as follows:

1. All the persons, other than the defendants, referred to in the indictment herein, No. 64 CR 350, possessed in or about August, 1963 and continuously thereafter to and including the date of this indictment, namely, September 22, 1964, unexpired and unrevoked United States passports which, however, had not been specifically validated by the Secretary of State for travel to Cuba.

Dated: Brooklyn, New York, April 29, 1966.

Yours, etc.,

JOSEPH P. HOEY,
United States Attorney,
Eastern District of New York,
Attorney for United States of America,
Office & P. O. Address,
542 United States Courthouse,
225 Washington Street,
Brooklyn, New York.

TO:

RABINOWITZ & BOUDIN, ESQS.,
330 East 42nd Street,
New York, New York.
Attorneys for all defendants
except defendant Phillip Abbott Luce.

[fol. 252]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 64 CR 350

[File Endorsement Omitted]

UNITED STATES OF AMERICA

against

LEE LEVI LAUB, PHILLIP ABBOTT LUCE, ELLEN IRENE SHALLIT, ALBERT LASATER MAHER, ROGER JAY TAUS, MARTIN ALBRECHT NICOLOUS, MICHAEL DAVID BROWN, CHRISTIAN LEE RAISNER and PATRICIA ANN SOPIAK, DEFENDANTS

JUDGMENT DISMISSING INDICTMENT—May 5, 1966

The defendants having been indicted herein on September 22, 1964 for violation of Title 18 United States Code, § 371, in which indictment it is charged that they did unlawfully, wilfully and knowingly conspire and agree together, and with each other, and with divers other persons, to violate Title 8 United States Code, § 1185(b) and the regulations thereunder, to wit: 22 C.F.R. §§ 53.2 and 53.3, in that they did unlawfully, wilfully and knowingly conspire and agree to induce, recruit and arrange for a number of American citizens to depart from the United States for the Republic of Cuba, without bearing valid passports for the Republic of Cuba, that Republic being a place outside of the United States for which a valid passport was required under the aforesaid regulations; and

All of the defendants, except Phillip Abbott Luce, having moved this Court for a Bill of Particulars requesting that the Government state whether all of the persons, other than the defendants, referred to in the indictment, possessed in or about August, 1963 and continuously thereafter up to and including the date of said indictment, namely, September 22, 1964, unexpired and unrevoked United States passports which, however, had not been

specifically validated by the Secretary of State for travel to Cuba, and to which said demand for a Bill of Particulars the Government did not object, and it appearing from the Particulars which were furnished in accordance [fol. 253] with the order of this Court entered herein on April 29, 1966 that the persons other than the defendants referred to in the indictment did possess during the aforesaid time period, unexpired and unrevoked United States passports which, however, had not been specifically validated by the Secretary of State for travel to Cuba; and

All of the defendants, except the defendant Phillip Abbott Luce, having moved this Court for an order dismissing the indictment herein on the ground that the indictment does not state facts sufficient to constitute an offense against the United States under Title 18 United States Code, § 1185(b) and the regulations issued thereunder, to wit: 22 C.F.C., §§ 53.2 and 53.3, and the Government having submitted its memorandum in opposition to said motion, and the defendants, except the defendant Phillip Abbott Luce, having appeared by their attorney, Leonard B. Boudin, Esq., in support of said motion, and the United States of America having appeared by its attorney, Joseph P. Hoey, United States Attorney for the Eastern District of New York, by Vincent T. McCarthy, Chief Assistant United States Attorney, in opposition thereto, and the matter having duly come on to be heard before me on the 29th day of April, 1966 and due deliberation having been had thereon, and the Court construing Title 8 United States Code, § 1185(b) and the regulations thereunder, to wit: 22 C.F.R., §§ 53.2 and 53.3, as it had previously construed them in the case of *United States* v. *Lee Levi Laub, Stefan Martinot and Anatol Schlosser*, No. 64 CR 137, the opinion in which case was filed on April 15, 1966, which opinion was based upon a prior similar conspiracy and which opinion is incorporated herein by reference and made a part hereof with respect to the legal construction of said § 1185(b) and the regulations issued thereunder;

NOW, on motion of all of the defendants except the defendant Phillip Abbott Luce, it is

[fol. 254] ORDERED, ADJUDGED AND DECREED that the indictment herein is hereby dismissed as to all the defendants named therein as failing to state facts sufficient to constitute an offense against the United States under Title 18 United States Code, § 371, for the reason that the Court construes Title 8 United States Code, § 1185(b) and the regulations thereunder, to wit: 22 C.F.R., §§ 53.2 and 53.3, as set forth in the opinion of the Court dated April 15, 1966 in the case of *United States* v. *Lee Levi Laub, Stefan Martinot and Anatol Schlosser*, No. 64 CR 137; and it is further

ORDERED, ADJUDGED AND DECREED that all of the defendants named in said indictment are hereby discharged.

Dated: Brooklyn, New York, May 5th, 1966.

/s/ Joseph C. Zavatt
Chief Judge, U. S. District Court
Eastern District of New York

[fol. 255]

[Acknowledgment of service Omitted in printing]

[fol. 256]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

64-CR-137

UNITED STATES OF AMERICA, PLAINTIFF

against

LEE LEVI LAUB, PHILLIP ABBOTT LUCE, STEFAN MARTINOT and ANATOL SCHLOSSER, DEFENDANTS

OPINION—April 15, 1966

APPEARANCES:

JOSEPH P. HOEY, ESQ.
United States Attorney
Eastern District of New York
Attorney for Plaintiff

VINCENT T. MCCARTHY, ESQ.
Chief Assistant, U. S. Attorney
Of Counsel

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Special Attorney
Department of Justice
Washington, D. C.
Of Counsel

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Attorneys for Defendants,
Lee Levi Laub and
Stefan Martinot

LEONARD B. BOUDIN, ESQ.
Of Counsel

[fol. 257] ENGLANDER & ENGLANDER, ESQS.
Attorneys for Defendant,
Anatol Schlosser

ISIDORE ENGLANDER, ESQ.
Of Counsel

JOSEPH FORER, ESQ.
711-14th Street N.W.
Washington, D. C.
Of Counsel

ZAVATT, Chief Judge

[fol. 258] This case relates to a trip to Cuba made by fifty-eight American citizens who departed from the United States in June 1963 via air transportation out of Idlewild International Airport (now known as Kennedy International Airport and hereinafter referred to as Kennedy Airport); entered Cuba, where they remained for approximately two months; returned therefrom to the United States, entering at Kennedy Airport on August 30, 1963.

The defendants were indicted, charged with having conspired among themselves and with Salvatore Cucchiari and Ellen Irene Shallit (named as co-conspirators but not as defendants) to induce, recruit and arrange for the group to depart from the United States for the Republic of Cuba "without bearing a valid passport for the Republic of Cuba," and to violate 8 U.S.C. § 1185(b)[1] and regulations issued thereunder. See notes 27, 28, 32, *infra*. The indictment also charges the defendants Laub, Luce and Martinot with having departed from the United States for the Republic of Cuba and with having entered the United States "without bearing a valid passport."[2] For the reasons hereinafter stated, the court is compelled to find the defendants Laub, Martinot and Schlosser not guilty on the counts of the indictment in and by which they are charged, *i.e.*, Counts One, Three and Five as to [fol. 259] the defendant Laub; Counts One, Two and Seven as to the defendant Martinot; Count One as to the defendant Schlosser. The indictment is still pending as to the defendant Luce. See note 2, *supra*.

The evidence on the trial suggests that, had the matter been so presented, a grand jury might well have indicted some or all of the four defendants for (1) having knowingly made false statements in their applications for permission to depart from the United States, in violation of 8 U.S.C. § 1185(a)(3);[3] (2) for having made false statements in their applications for passports, in violation of 18 U.S.C. § 1542; (3) for having used their passports, the issue of which was secured by reason of false statements, in violation of 18 U.S.C. § 1542;[4] "(4) for having conspired to induce others to make false statements in their applications for passports, in violation of 18 U.S.C. § 1542." The evidence suggests, further, that a grand jury might well have indicted at least the defendant Laub, charging him with having acted as the agent of a foreign principal without having filed a registration statement with the Attorney General, in violation of Subchapter II of Chapter 11 of Title 22, United States Code.[5] Nevertheless, an indictment was sought and obtained charging the defendants only with alleged violations of 8 U.S.C. § 1185(b) and "the regulations issued there-[fol. 260] under" and with a conspiracy to violate the same.

THE FACTS

The United States severed diplomatic relations with Castro's Communist Cuba on January 3, 1961. We became aware of Cuba-Russia missile activities in Cuba in October 1962. Pres. Procl. 3504, October 23, 1962, 3 CFR 232 (1959-1963 Comp.). It may or may not be a mere coincidence that the defendants Laub and Martinot organized the so-called "Ad Hoc Student Committee for Travel to Cuba" at a meeting held in an unspecified place in New York City on October 14, 1962; that the defendant Schlosser became identified with this movement shortly thereafter; that, during the missile crisis and in December 1962, the name of the Committee was changed to "Permanent Student Committee for Travel to Cuba"; that the Committee attempted to recruit and organize a group of United States citizens to depart for Cuba in December 1962. This plan aborted when Canada refused them

permission to depart therefrom by plane for Cuba. By coincidence the trial of the defendants Laub, Martinot and Schlosser occurred during the mass exodus from Cuba of native citizens who abandoned all of their wordly possessions, separated from close relatives and lifelong friends [fol. 261] and risked the perils of the sea in small boats in order to escape from the "blessings" of Castro's Communist Cuba for a new birth of freedom in the United States of America. The mass exodus still continues as this opinion is being written.

The intention of the defendants Laub, Martinot and Schlosser to depart from the United States for the purpose of entering Cuba and to induce others to do likewise was open, notorious, with an awareness of 8 U.S.C. § 1185 (b), the regulations of the Secretary of State (hereinafter the Secretary), his regulations, his policy declaration of January 16, 1961, *infra*, and the interpretation of § 1185, said regulations and said declaration by the Department of State (hereinafter the Department).

At the meeting of October 14, 1962, those present claimed that there were contradictions in "certain press reports . . . about Cuba"; they expressed their determination to make a trip to Cuba for the alleged purpose of seeing and evaluating the situation and "to attempt to form as objective and as complete an opinion . . . of the Cuban situation" as they could. Five days later, on October 19, 1962, the defendant Schlosser applied in writing to the Department for validation of his passport "for travel to Cuba during the forthcoming Christmas [fol. 262] vacation." Having received no reply, he wrote to the Department on November 16, 1962, stating: "I have received and accepted an invitation from the Cuban Federation of University Students to spend my Christmas holidays in Cuba." His request was denied by letter dated November 16, 1962:

> "Exceptions to the general policy of limiting travel by United States citizens to Cuba are made only in cases of extreme emergency requiring the immediate presence of the applicant in Cuba. It is not considered that your request comes within the criteria."

Undaunted, Schlosser advised the Department, by letter dated December 5, 1962:

> "Nevertheless, I have accepted an invitation issued by the Cuban Federation of University Students, and I intend to make the trip as originally planned. Therefore, please clarify what is meant by 'general policy.' On what legal grounds is this policy based? what [sic] will be the legal ramifications of my actually making the trip without United States passport validation?"

Whereupon, the Department advised him that its policy with reference to travel to Cuba had been announced on January 16, 1961; that it was "in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations"; that "Travel to Cuba by United States citizens without a passport specifically validated by the Department of State, for that purpose, constitutes [fol. 263] a violation of the Travel Control Law and Regulations (Title 8 U.S. Code Sec. 1185, Title 22 Code of Federal Regulations Sec. 53.3)" and called his attention to the maximum penalties for "a wilfull violation of the law."

On November 2, 1962 (three weeks after the meeting of October 14, 1962), the defendant Martinot applied for validation of his passport "for a trip to Cuba over the forthcoming Christmas vacation." "I am fully cognizant of the present state relations between the United States and Cuba, but trust that my [sic] the end of December the tension may have subsided sufficiently to permit a more objective view of the situation." This request was denied by a Department letter similar to and bearing the same date as that to Schlosser.

Nevertheless, the plan to make a trip to Cuba in December 1962 was not yet abandoned. Pursuant to an announcement published in the National Guardian, a meeting of the Committee (still known as the "Ad Hoc Committee for Travel to Cuba"), attended by approximately one hundred persons, was held in an apartment at 885 Riverside Drive, New York, N.Y., on December 15, 1962. There Schlosser read his correspondence with the Depart-

ment; Laub asserted that, notwithstanding, the December trip would be taken at a cost of only $25 per head [fol. 264] (to cover the bus trip from New York City to Canada) and that "the rest of the cost was to be picked up by the Cuban Government." At a press conference held at the Marteen Hotel in Buffalo, N.Y., on December 23rd, however, Schlosser, speaking for the Ad Hoc Committee, announced that the plans for a trip to Cuba were cancelled temporarily but that the Committee would continue in its efforts to visit Cuba.

Soon thereafter steps were taken to recruit applicants and make arrangements for the trip that eventuated in June 1963 and is the subject matter of this case. A passport issued to Laub on May 24, 1960, had not yet expired.[9] Nevertheless, he applied to the New York Passport Agency of the Department on January 29, 1963, for a new passport, stating that he intended to depart for Mexico on February 1, 1963, and to remain there for a period of two to three weeks for "vacation and visit."[10] Passport No. D014611 was issued to him the same day. Unlike the passports issued to Martinot and Schlosser, it did not provide that it was not valid for travel to Cuba.[11]

In either February or March 1963, Laub departed the United States, via Mexico, for Cuba where he remained for approximately three weeks and returned to the United [fol. 265] States via Prague, Czechoslovakia. The purpose of his trip was to make arrangements for a group visit of United States citizens to Cuba during the summer of 1963, under the aegis of the Permanent Student Committee for Travel to Cuba. While in Cuba Laub obtained an agreement on the part of Cuban officials (1) that the passports of the members of the visiting group would not be stamped upon their entry into and departure from Cuba and (2) that the Cuban government would pay all costs of transportation of the group from New York to Cuba and return as well as the costs of their food, lodging and travel while in Cuba.

An active program to recruit persons for and to organize the June trip got under way. Laub, Martinot, Luce and Schlosser, as well as the alleged co-conspirators, Cucchiari and Shallit participated. Meetings, attended

by two or more of the defendants were held. Meetings, attended by one or more of the defendants, and by prospective recruits, were held. At a meeting held at the Palonia Club, 201 Second Avenue, New York, N.Y., on April 20, 1963, attended by Laub, Martinot and approximately ten to fifteen other persons, Laub invited those present to make the trip and distributed application forms which included the telephone number of Schlosser, [fol. 266] where a representative of the Permanent Committee could be reached. Laub held out the prospect of a trip to Cuba, most of the expenses of which would be paid by a group of Cuban students; assured them that their passports would not be stamped in Cuba; referred to a memorandum of law prepared by the American Civil Liberties Union supporting his opinion that a State Department passport validation was not required for the trip; stated that, if those who made the trip were arrested, the American Civil Liberties Union might defend them; outlined the procedure to be followed by those who desired to make the trip.

On a Saturday during the second week of May, Luce visited Schlosser's home at 42 St. Marks Place, New York, N.Y. (having previously received an application blank from Laub), where he discussed his application with Schlosser and Martinot.[12]

While the other defendants occupied themselves with the project in New York, Laub travelled to San Francisco, California, to induce people to join the group. On May 2, 1963, he addressed from fifty to sixty students at the Education Building of San Francisco State College, at a meeting sponsored by the "San Francisco State College Student Peace Union" and the "Fair Play to Cuba [fol. 267] Committee." He explained the project of the Permanent Student Committee; stated that he was travelling around the country[13] to advise students of the planned trip and that, in his opinion, the trip was lawful. He distributed application forms; advised those interested to apply for passports and list a European country as the place to be visited; stated that most of the expenses would be paid by the Cuban Federation of University Students and announced a meeting to be held on May 4, 1963, in San Francisco at the apartment of one

Robert Kaffke, where completed applications would be received and questions about the trip answered. From twenty-five to thirty-five persons attended this meeting. Laub collected applications and $10 application fees. One such, a check to the order of the Permanent Student Committee, was subsequently endorsed for the Committee by Schlosser.

Laub was back in New York City during the latter part of May and proceeded to reserve air transportation for the group. He was at the Fifth Avenue, New York, office of British Overseas Airways Corporation (hereinafter BOAC) on May 28th and 31st, seeking reservations for a group departure on any available date between June 25th and 29th. On May 31st he also visited the New York office of Royal Dutch Airlines (hereinafter KLM) to [fol. 268] arrange for round trip flights to Paris, via Amsterdam, for other members of the group, the date of departure from Kennedy Airport to be some time between June 25th and July 1st. Those who were to take the trip, he said, were friends who, as children, had pledged to meet some day at the Eiffel Tower in Paris. On June 10th he was at the Ottawa, Canada, office of BOAC, where he paid a $5,000 deposit in United States currency for New York to Paris round trip reservations. The following day he returned to that office and paid the balance of $17,739.20 in United States currency. That day he also visited the Ottawa office of KLM where he paid $13,436.80 in United States currency. A few days later, Laub was back in New York City; visited the KLM office, where he made changes in the number of reservations and received either twenty-two or twenty-three tickets for the group which was to depart from Kennedy Airport on June 25th aboard KLM flight number 606 for Paris via Amsterdam. He was back at the New York City office of BOAC on June 22nd, where he received tickets for a group flight on BOAC flight number 552 departing for London on June 25, 1963, and further transportation of the group to Paris on British European Airways flight number 344. He also picked up a ticket for Martinot on BOAC flight number 558 departing Kennedy Airport for Paris on June 23, 1963. On June 24, 1963, Laub ordered

[fol. 269] and received his ticket for a Trans-Canada Air Lines flight to Montreal, Canada, departing June 25, 1963. He already had his ticket for a connecting flight on Air France departing the same day from Montreal for Paris.

The alleged co-conspirator, Salvatore Cucchiari, was in the West Coast area to inform selected participants as to how they were to proceed to New York and what they should do upon arrival there. He arranged for free transportation of two of the travellers by automobile from San Francisco to Philadelphia and instructed them to call a specified telephone number upon their arrival in New York City. These two members of the group later learned that they were calling the apartment of the alleged co-conspirator Ellen Shallit. Upon arrival at her apartment on June 23rd, Shallit requested of each of them the $100 fee which Laub had explained at the May 2nd and 4th meetings in San Francisco. Cucchiari turned up at the Shallit apartment that day.

On the following day, Laub telephoned a prospect in [fol. 270] Boston to advise that, if he were still interested in making the trip, he should come to New York City that afternoon and telephone Shallit upon arrival. He did so and, pursuant to Shallit's instructions, went to her apartment. Cucchiari, Shallit and others who were to make the trip were present at the Shallit apartment. Cucchiari gave instructions as to their conduct and movements until departure time the following day. (By this time the activities of the defendants and their "co-conspirators" were no longer open and notorious). In order to avoid any leak of the actual flight arrangements, Cucchiari told those present that they would be travelling to Cuba via Canada.

On June 23rd Laub had met with and instructed those who were to be group leaders. Those who were making the trip were to be separated into small groups, each under the supervision of a leader. Each leader was to keep his group confined to an apartment until their departure for the air terminal. Leaders were not to divulge the actual flight route. Rather, they were to inform their groups that they would travel to Cuba via Canada. No members of the group were to speak to any government official who

might approach them. Only group leaders would act as spokesmen. No one was to turn over his passport to any [fol. 271] government official under any circumstance.

The morning of June 25th had the aspects of a cloak and dagger operation. Small groups met in various apartments, including those of Martinot, Luce and Shallit. In Martinot's apartment, Laub gave final instructions to one group. In Shallit's apartment, final instructions were given to another group by Cucchiari and Shallit. Copies of a press release, prepared in part by Luce and postdated June 26, 1963, were distributed, which restated the alleged objectives of the Permanent Committee and named Laub, Luce, Shallit and Cucchiari as "group representatives." Cucchiari distributed airline tickets to the members of this group. Luce, as leader of a group gathered in his apartment, gave final instructions and collected $300. Laub appeared at Luce's apartment that afternoon accompanied by one Fred Jerome, a leader of the Progressive Labor Party, which Luce described as "a Marxist-Leninist self-avowed Communist Party." Luce delivered the $300 to Laub who left with Jerome.

At about noon of June 25th, the several groups of fellow travellers left the respective apartments for the East Side Airlines Terminal. At the Terminal Laub dis- [fol. 272] tributed the airplane tickets to those who had been held incommunicado in Martinot's apartment; Fred Jerome delivered to Luce the airline tickets for his group; Cucchiari distributed the airline tickets to those who had been held incommunicado in Shallit's apartment. Martinot had departed from Kennedy Airport for Paris two days previously aboard BOAC flight number 558. Laub departed from Kennedy Airport June 25th for Canada (via Trans-Canada Air Lines) and, on the same day, from Canada for Paris (via Air France). The balance of the group (including Cucchiari, Shallit, Kaffke, Luce and his wife) departed the United States from Kennedy Airport via KLM and BOAC, on June 25, 1963.

The exact date of Martinot's arrival in Paris is not revealed. But he was in Paris before the group arrived. Laub and the rest of the group arrived at Orly Airport, Paris, on June 26, 1963. After checking in at one or more hotels for an overnight stop in Paris, the entire group

met in a private room in a restaurant. There, in the presence of Martinot, Laub announced that the group would proceed to Prague the next morning via Czechoslovakia National Airlines; that each was free to spend the evening as he chose; that no one should do anything provocative, such as excessive drinking, which might entail difficulties with the police; that the group was in [fol. 273] no position to appeal to the American Embassy "to bail us out."

On the morning of June 27, 1963, the entire group checked in at the Czechoslovakia National Airlines counter at Orly. They boarded a specially chartered plane of that airline and arrived at Prague, Czechoslovakia, later that day. Their passports were not stamped upon arrival at or subsequent departure from Czechoslovakia, pursuant to arrangements previously made with Czechoslovakian authorities in Prague by a representative of Cuba. In a waiting room at Prague Airport, a Vice Consul of the United States read to them a prepared statement advising them that "travel to Cuba by a U.S. citizen without a passport specifically validated by the Department of State for that purpose constitutes a violation of U.S. travel control law and regulations. (Title 8 U.S. Code Sec. 1185; Title 22 Code of Federal Regulations, Sec. 53.3)" and that a wilfull violation of the law is punishable by fine and/or imprisonment. The group spent two days at a hotel in Carlsbad. The were addressed by two representatives of the Cuban government, one of whom expressed the pleasure of his government over the fact that young Americans had decided to break the travel ban by going to Cuba.

On the morning of June 29, 1963, the group departed [fol. 274] from Prague Airport aboard a Cubana Airlines plane which proceeded to Havana, Cuba (via Shannon, Ireland, and Gander, New Foundland), landing there on June 30, 1963. None of the group displayed his United States passport upon arrival, or upon his subsequent departure from Cuba.

The indictment does not cover the period during which the group was in Cuba. Hence, the activities of the defendants Laub and Martinot and other members of the group were not revealed at the trial. It was stipulated

on the record at the trial, however, that the defendants Laub and Martinot departed Cuba August 25, 1963, via Iberian Airlines for Madrid, Spain, with stopovers at Bermuda and the Azores; that they arrived at Madrid on August 26, 1963; that they departed Madrid August 29, 1963, aboard a plane of Iberian Airlines and entered the United States at Kennedy Airport on August 30, 1963.

The committee titles adopted by the defendants who originated the plan to visit Cuba—"Ad Hoc Student Committee" and "Permanent Student Committee"—would suggest as referents a group of curious, inquisitive, open-minded college youth eager to make an objective, on the spot study of conditions in Cuba. The fact is, however, [fol. 275] that the defendant's Laub, Martinot and Schlosser (as well as Luce) embarked upon this project with a preconceived conviction that the American press was not giving Cuba a "fair shake," with all that that implies. There was an absence of the yearning to learn by travel "whether or not this blessed spot is blest in every way." [14]

Luce was not a student at any school or college. He had received a B.A. degree in 1958 at Mississippi State University and an M.A. degree at Ohio State University in 1960. In 1961 he abandoned his pursuit of a Ph.D degree at Ohio State University and came to New York City where he wrote, as he testified, "for a variety of left-wing publications" for a short time. From the fall of 1961 to September of 1964, he was in the employ of the Emergency Civil Liberties Committee as associate editor of its publication, "Rights." Laub had been a student at Columbia College in New York City where he was in his senior year in October 1962. It would appear that he abandoned or at least neglected his college career, became an organizer of the Progressive Labor Movement [15] and devoted a [fol. 276] considerable period of his time to the organization of a program to defy the State Department's regulations purporting to restrict travel of United States citizens to Cuba. Robert Kaffke, one who made the trip, was thirty-eight years of age in 1963, hardly in the "student" class. Martinot had been a graduate mathematics student at Columbia University. He and Laub were the organiz-

ers of the "Columbia Progressive Labor Student Club." He testified to that effect and admitted to being a Marxist-Leninist before the House Committe on Un-American Activities in May of 1963, prior to his departure for Cuba.[16]

Of the fifty-eight "students" who made the trip, twenty-five to thirty stood up in Havana, Cuba, when Laub asked all members of the Progressive Labor Group to rise. It would appear that the majority of those who made the trip were committed in advance to the views and objectives of the left-wing Progressive Labor Party. Considering the intensive campaign waged by the defendants, and particularly Laub; Laub's big-sell at so many of our college and university campuses; the tempting lure of an all-expense trip to and vacation in Cuba—considering all of this, it is significant that the defendants were able to corral such a small group. From the known composition [fol. 277] of a majority of the group, it would appear that few, if any, in the group were typical American students; that the vast majority of the students solicited by the defendants displayed greater resistance to temptation than Adam and Dr. Faustus.

This court does not equate dissent with disloyalty. Nor does it equate loyalty with dissent. It has no doubt that the objective of the defendants was not a genuine search for the truth in Cuba. Nevertheless, the issues in this case are not to be determined on the basis of the political views of the defendants or their sincerity or lack thereof. Their actions may excite popular prejudice and many American citizens may feel that the defendants come within the class which President Lincoln described as those who "stand on the Constitution, whilst they [would] stab it in another place." [17] "[B]ut if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought —not free thought for those who agree with us but freedom for the thought that we hate." Dissent of Mr. Justice Holmes in *United States* v. *Schwimmer*, 279 U.S. 644, 654-55, 49 S.Ct. 448, 451 (1929).

[fol. 278] THE LAW

The court finds beyond a reasonable doubt that the defendants Laub, Martinot and Schlosser wilfully and knowingly agreed among themselves and with Salvatore Cucchiari and Ellen Irene Shallit to induce, recruit and arrange for a group of American citizens, including the defendants Laub and Martinot, to depart from the United States for the Republic of Cuba; that the defendants Laub, Martinot and Schlosser performed the acts in furtherance thereof hereinabove recited; that the defendants Laub and Martinot wilfully and knowingly departed from the United States for the Republic of Cuba on June 23 and June 25, 1963, respectively; that the defendant Laub and Martinot wilfully and knowingly entered the United States on August 30, 1963, arriving from the Republic of Cuba via Bermuda and Spain.

The questions are whether the said agreement constituted a conspiracy; whether the acts they performed, hereinabove recited, were performed in furtherance of a criminal conspiracy; whether the defendants Laub and Martinot committed substantive crimes when they departed from and entered the United States.

[fol. 279] *A Case of First Impression*

It has already been noted that the defendant Schlosser bore a passport, issued by the Department on June 11, 1962 (see note 6, *supra*); that the defendant Martinot bore such a passport, dated October 23, 1962 (see note 7, *supra*); that the defendant Laub was the bearer of such a passport dated January 29, 1963 (*supra* page 9). The period of the validity of each of these passports being three years,[18] they had not expired when the defendants departed from and returned to the United States. The passports of the defendants Martinot and Schlosser provided in print:

> "This Passport Is Not Valid For Travel To Or In Communist Controlled Portions Of China, Korea, Viet-Nam, Or To Or In Albania."

In addition, the word "Cuba" was stamped beneath the names of the proscribed countries included in print. Be-

neath the names of all of these countries, including "Cuba," the passports of Martinot and Schlosser bore the following stamp:

> "A Person Who Travels To Or In The Listed Countries Or Areas May Be Liable For Prosecution Under Section 1185, Title 8, U.S. Code, And Section 1544, Title 18, U.S. Code."

The passport issued to the defendant Laub, on the other [fol. 280] hand, contained no reference to Cuba. Why "Cuba" was not listed on his passport as one of the proscribed areas and the significance, if any, of that omission were not explained or commented upon during the trial or in any trial memoranda. Nevertheless, Laub was aware of the regulations and policy of the Secretary when he applied for his passport and when he departed from and returned to the United States.

The substance of section 1185 first appeared in the Act of May, 22, 1918, ch. 81, 40 Stat. 559. It was in effect until 1921 when its provisions relating to citizens of the United States were terminated. Act of March 3, 1921, ch. 136, 41 Stat. 1359. In 1941, the Act of May 22, 1918 was revived by an amendment thereto. Act of June 21, 1941, ch. 210, 55 Stat. 252, The 1918 Act applied only while the United States was at war. The 1941 amendment applied not only while the United States was at war but also during the existence of the national emergency declared by the President on May 27, 1941. Proclamation No. 2487, 3 CFR 234 (1943 Cum. Supp.). These acts prohibited the departure from and entry into the United States by a citizen "unless he bears a valid passport." This prohibition remained in effect until it was supplanted in 1952 by 8 U.S.C. § 1185. During these [fol. 281] periods (1918 to 1921 and 1941 to 1952) the departure and entry provisions were in effect by virtue of requisite proclamations and executive orders of the President. Proclamation No. 1473, August 8, 1918, Laws Applicable to Immigration and Nationality 1046 (1953 ed.); Executive Order No. 2932, August 8, 1918, *id.* at 1050; Proclamation No. 2523, November 14, 1941, 6 Fed. Reg. 5821. The regulations to implement Executive Or-

der No. 2932 were contained in that order. Those to implement Proclamation No. 2523 were issued by the Secretary. 22 CFR Part 58 (1941 Supp.). These regulations of the Secretary, as modified and renumbered, were incorporated by reference into President Truman's Proclamation No. 3004, January 17, 1953, *infra*.

An attorney adviser with the Department who is "Chief of the Security Branch of the Legal Division" testified that he had not, in the course of his duties, read of any case which was prosecuted under the Act of May 22, 1918, *supra*, or the Act of June 21, 1941, *supra*, between 1918-1921 and 1941-1952, involving one who departed the United States with an unexpired passport issued by the Department and visited a proscribed area, despite the fact that his passport either was not validated for travel to such an area or recited that it was not valid for such travel. On the trial of this action, the Government con- [fol. 282] ceded that, from 1952 (when section 1185 was enacted) to 1965, approximately 600 American citizens violated the Secretary's regulations and the restrictions contained in their unexpired passports by traveling to areas proscribed by the Secretary with passports not validated for such travel. Nevertheless, it is conceded that none of those citizens were prosecuted and that this is the first case in which the Government is prosecuting citizens of the United States criminally for a violation of 8 U.S.C. § 1185(b) for having departed the United States with an unexpired passport issued by the Secretary, thereafter entering an area so proscribed and thereafter entering the United States.

There are two reported cases in which citizens, bearing no unexpired passports, have been so prosecuted. In *Worthy* v. *United States*, 328 F.2d 386 (5th Cir. 1964), the defendant departed from the United States, entered Cuba and returned therefrom. He was prosecuted under 8 U.S.C. § 1185(b) for entering the United States "without bearing a valid passport"; found guilty and sentenced. Since he did not bear a nonexpired passport issued to him by the Department, the question as to what constitutes a "valid passport" was not presented. On appeal, the court held § 1185 unconstitutional insofar as it subjects

[fol. 283] to a criminal penalty a citizen who "does not have a passport" and returns to the United States: "[I]t is our conclusion that the Government cannot say to its citizen, standing beyond its border, that his reentry into the land of his allegiance is a criminal offense; and this we conclude is a sound principle whether or not the citizen has a passport, and however wrongful may have been his conduct in effect his departure." 328 F.2d at 394.[19] In *United States* v. *Travis*, 241 F.Supp. 472 (S.D. Cal. 1964), *aff'd* —— F. 2d —— (Docket No. 19628, 9th Cir. Nov. 19, 1965), *petition for cert. filed*, 34 U.S.L. Week 3268 (U.S. Jan. 28, 1966) (No. 963), the defendant departed from the United States on two occasions with the intention of entering Cuba and did so via Mexico. For these two departures she was prosecuted under 8 U.S.C. § 1185(b) and the regulations thereunder, 22 CFR 53.1 through 53.9. It is not clear from a reading of the trial judge's opinion denying defendant's motion to dismiss the indictment, 241 F.Supp. 468 (S.D. Cal. 1963), from his opinion finding the defendant guilty, 241 F.Supp. 472 (S.D. Cal. 1964) or from the opinion of affirmance, *supra*, whether the defendant had no unexpired passport or had an unexpired passport not validated for travel to Cuba, [fol. 284] *i.e.*, a passport similar to that issued by the Department to the defendants Martinot and Schlosser. The trial judge has advised the court, however, that Helen Travis did not have *any* unexpired passport when she made the two departures for Cuba.[20]

Unlike *Zemel* v. *Rusk*, 381 U.S. 1, 85 S.Ct. 1271 (1965), the question for decision in the instant case is not whether the Secretary had the authority to refuse to validate the passports of the defendants Martinot and Schlosser for travel to Cuba. In *Zemel* the Supreme Court held that the Secretary had authority to refuse to "validate appellant's passport for travel to Cuba . . . by the authority granted by Congress in the Passport Act of 1926," [21] 381 U.S. at 13, 85 S.Ct. at 1279. The Court did not reach the question presented in the instant case, *i.e.*, whether the enactment of 8 U.S.C. § 1185 in 1952 attaches criminal penalties to travel to an area for which one's passport is not validated. 381 U.S. at 13, 29, 85 S.Ct. at 1279, 1287, n. 4.

The statute and "the regulations thereunder"

8 U.S.C. § 1185(a) (see note 1, *supra*) is effective

> "When the United States is at war or during the existence of any national emergency proclaimed by the President . . . *and* the President shall find that the interests of the United States require that re-
> [fol. 285] strictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the *departure of persons from and their entry into* the United States, *and* shall make public proclamation thereof. . . ." (Emphasis added.)

The latest presidential proclamation of a national emergency is that by President Truman on December 16, 1950, Proclamation No. 2914, 64 Stat. A454, 3 CFR 99 (1949-1953 Comp.).[22] The continuance of the national emergency, so proclaimed, was recognized by President Eisenhower in 1960 and in 1961[23] and by President Kennedy in 1962.[24] There has been no presidential proclamation terminating the national emergency so declared. The defendants contend that the 1950 Presidential Proclamation related only to the emergency created by the Korean conflict and that the duration of the emergency so proclaimed must be limited to the duration of that conflict; that "[t]his court is not bound by a decade-old declaration of a national emergency which is inapplicable to the present situation and no longer exists." The parties to the instant case offered no evidence as to whether the national emergency so proclaimed still exists. The defendants tried this case on the fundamental proposition that, even if a national emergency still existed during the times stated in the indictment, section 1185(b) does not apply [fol. 286] to the facts in this case. The court does have a right to consider whether the national emergency has expired by lapse of time. *Chastelton Corp.* v. *Sinclair*, 264 U.S. 543, 547, 44 S.Ct. 405, 406 (1924); *contra*, *United States* v. *Travis*, 241 F.Supp. 468, 471 (S.D. Cal. 1963). For the reasons stated in *MacEwan* v. *Rusk*, 228 F.Supp. 306, 312-13 (E. D. Pa. 1964), *aff'd*, 344 F.2d 963 (3d Cir. 1965), the court finds that the national emergency

so proclaimed has not expired.[25] This contention of the defendants merits no extended treatment, since the court finds that the acts of the defendants do not constitute a crime under § 1185(b), even during the continuance of a national emergency proclaimed by the President pursuant thereto.

President Truman did not make the finding and the public proclamation thereof required by section 1185(a) or impose additional restrictions, pursuant to section 1185(b), upon the departure of citizens of the United States from and their entry into the United States until his Proclamation No. 3004 of January 17, 1953, 67 Stat. C31, 3 CFR 180 (1949-1953 Comp.).[26]

The regulations of the Secretary, incorporated into this presidential proclamation by reference, had been pre-
[fol. 287] scribed by the Secretary pursuant to the Act of May 22, 1918, as amended, *supra*, and were published as 22 CFR 53.1-53.9 (1949 ed.). Only sections 53.1 and 53.2 thereof (renumbered 53.2 and 53.3, respectively, in the 1958 revision of 22 CFR) are pertinent.[27]

Section 1185(b) contains a general prohibition against the departure of a citizen from or entry into the United States unless he bears a valid passport. If it contained no limitation or exception, section 1185(b) would require "a valid passport" for every departure from the United States. But Congress authorized the President to make or to authorize the making of limitations upon and exceptions to this broad general prohibition. President Truman prescribed limitations upon and exceptions to the broad prohibition of section 1185(b) when, in his Proclamation No. 3004, January 17, 1953, he incorporated therein the regulations previously prescribed by the Secretary. The Secretary's regulations, like section 1185(b), contained and still contain the broad general limitation upon departure from and entry into the United States without a valid passport. 22 CFR 53.2 (1958 rev.). Section 53.3 thereof goes on to place limitations upon and exceptions to the broad general provision of section 53.2. It enum-
[fol. 288] erates the circumstances under which "no valid passport" is required. But it states the exceptions in terms of "traveling between the continental United States"

and certain specified places. When these regulations were incorporated into President Truman's Proclamation of 1953, one could depart and travel between the United States and a number of places including "any country or territory in North, Central or South America or in any island adjacent thereto," without a valid passport. Under these regulations, at that time, one could, for example, depart for Canada, Mexico or Cuba (an island adjacent to North and Central America) without a passport. For travel between the United States and countries and territories other than those excepted by the regulations, a valid passport was required.

On January 16, 1961, the Secretary of State, by Loy W. Henderson, Deputy Under Secretary for Administration, amended 22 CFR 53.3(b)[28] by Departmental Regulation No. 108.456, 26 Fed. Reg. 482-83, so as to bring Cuba within the general provisions of section 53.2 (and, thereby, within the general provision of § 1185(b)). He stated therein that the amendment was made "Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, dated March 31, 1938," 3 Fed. Reg. 681-[fol. 289] 687,[29] and that said Executive Order had been issued pursuant to 22 U.S.C. § 211a[30] and 5 U.S.C. § 151c.[31] After reciting this authority, and out of context, there is inserted in the middle of this amendment (in parentheses) a citation of 8 U.S.C. § 1185 and Proclamation No. 3004. The parenthetical insertion does not state that the Secretary claims these cited provisions as authority for the amendment. One must assume, however, that, by this unexplained parenthetical insertion, the Secretary purported to amend his regulations not only pursuant to the authorities first cited in the introductory paragraph but also under the authority of § 1185 and Proclamation No. 3004.

As so amended, Cuba was now placed in the same class with the countries of Europe with which we maintained diplomatic relations. Under the general provision of § 1185(b) and section 53.2 of the Secretary's regulations one was required to bear a valid passport if he departed for Europe or, for that matter, for any other country not excepted from the general provision. Under the gen-

eral provision of section 1185(b) and of section 53.2 of the regulations one was required to have a valid passport merely because he was departing from the United States, except as limitations upon and exceptions to this re-
[fol. 290] quirement were authorized and prescribed by the President. If section 1185(b) empowered the President to place limitations upon *travel to* a particular country or territory one would expect that the Secretary would have incorporated prohibitions upon "travel to a country or territory" in his regulations. When section 53.3(b) of his regulations was amended, as aforesaid, however, the Secretary did not include in that amendment a provision invalidating outstanding passports for travel to or in Cuba or requiring that passports issued thereafter would not be valid for travel to or in Cuba unless specifically endorsed for such travel. Rather, on the same day when the Secretary so amended section 53.3 of his regulations, he made an announcement, in the form of a press release entitled "Restrictions on Travel to or in Cuba," thereafter published as Public Notice 179, 26 Fed. Reg. 492.[32] The authority he cited therein for this public notice is 22 U.S.C. § 211a and Executive Order No. 7856 of President Roosevelt issued back in 1938. Neither section 1185 nor its predecessor was in effect in 1938. President Roosevelt had issued this Executive Order under the authority of 22 U.S.C. § 211a. It is to be noted that this announcement by the Secretary is not published in the Code of Federal Regulations, but merely in the Fed-
[fol. 291] eral Register where it appears under the section "Public Notices," not under Part 53 of Title 22 entitled "Travel Control of Citizens and Nationals in Time of War or National Emergency." On the other hand, the Secretary's amendment to 22 CFR § 53.3(b), *supra*, requiring a passport for travel between the United States and Cuba, is published under said Part 53. This suggests an awareness of the difference between departure regulations, promulgated under § 1185, and "travel to" regulations, promulgated under section 211a. For regulations, purporting to be promulgated under section 1185 are uniformly published in Part 53 of 22 CFR; those promulgated pursuant to section 211a are usually published in

Part 51 ("Foreign Relations, Part 51—Passports") thereof, if they are published under any specified part.

The indictment charges the defendants with conspiracy to violate section 1185(b) "and the regulations issued thereunder" and with having departed from and entered the United States in violation of section 1185(b). The public notice of the Secretary, not § 1185(b) or "the regulations issued thereunder," purports to render United States passports not valid for travel to or in Cuba unless specifically endorsed for such travel.

[fol. 292] *What is a Passport?*

The word "passport" derives from the early modern French "passeport" ("passe," he passes plus "port" or harbour).[33] The Act of May 22, 1918, *supra*, did not define "passport."[34] The President, however, defined it in his Executive Order No. 2932, *supra*, entitled "Rules and Regulations Governing the Issuance of Permits to Enter and Leave the United States," as follows:

> "Sec. 5. The term 'passport' as used herein includes any document in the nature of a passport issued by the United States or by a foreign government, which shows the identity and nationality of the individual for whose use it was issued and bears his signed and certified photograph."

This definition accords with that of Green Hackworth,[35] while Legal Advisor to the Department of State. He gave the traditional definition in 1942—before the Supreme Court recognized exit control as the "crucial function" of a passport in *Kent* v. *Dulles*, *infra*.

The Supreme Court has defined "passport" in two noteworthy opinions. In *Urtetiqui* v. *D'Arcy*, 9 Pet. (34 U.S.) 692, 699 (1835), the Court, holding a passport inadmissible as proof of citizenship, said:

> "It is a document which, from its nature and object, is addressed to foreign powers; purporting only to [fol. 293] be a request that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized in foreign countries as an Ameri-

> can citizen; and which, by usage and the law of nations, is received as evidence of the fact."

In *Kent* v. *Dulles*, 357 U.S. 116, 121, 129, 78 S.Ct. 1113, 1115, 1120 (1958), the Court quoted this statement from *Urtetiqui* as to the function of a passport and continued:

> "[T]hat function of the passport is subordinate. Its crucial function today is control over exit."

In *Worthy, supra*, 328 F.2d at 391, the Court of Appeals for the Fifth Circuit gave a definition which, in effect, combined those in *Urtetiqui* and *Kent* and added a "travel to" component:

> "A passport is evidence of the permission of the sovereign to its citizen *authorizing him to travel to foreign countries* and to return to the land of his allegiance, as well as a request to foreign powers that the person to whom it has been issued may be allowed to pass freely and safely." (Emphasis added.)

The definition in *Urtetiqui*, as expanded in *Kent*, is supported by the history of passports and documents in the nature of passports,[36] as well as by the opinions of the deans of many law schools and several professors of law.[37] The court in *Worthy, supra*, cites no authority for its "travel to" aspect of a passport. This court cannot accept the *Worthy* definition as applicable to the instant criminal [fol. 294] prosecution for having *departed from* the United States without a valid passport.

No statutory definition of "passport" (prior to the enactment of the Immigration and Nationality Act of 1952, 66 Stat. 163, 166, 8 U.S.C. §§ 1101 *et seq.*), has been found. Section 101 (a) (30) of that Act (8 U.S.C. § 1101 (a) (30) defines "passport" as follows:

> "(30) The term 'passport' means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the entry of the bearer into *a* foreign country." (Emphasis added.)

Prior to this Act of 1952, the predecessor of section 1185 was included in Title 22 of the United States Code, en-

titled "Foreign Relations and Intercourse." This section of the Code was repealed when its substance was incorporated into the Immigration and Nationality Act of 1952 as section 215 (8 U.S.C. § 1185). This Act relates primarily to immigrant aliens. This statutory definition, in terms of "entry . . . into a foreign country," stated in an omnibus Immigration and Nationality Act, casts little light upon the meaning of a criminally punitive provision (albeit incorporated into and engrafter upon that Act) for departure from the United States without a valid passport.

[fol. 295] *What is a Valid Passport?*

Prior to 1856, various federal, state and local officials and notaries public had undertaken to issue either certificates of citizenship or other documents in the nature of letters of introduction to foreign officials, requesting treatment by them of the bearer according to the usages of international law. Congress put an end to such practices by the Act of August 18, 1856, 11 Stat. 52, 60-61, 22 U.S.C. § 211a. *Kent* v. *Dulles*, *supra*, 357 U.S. at 123, 78 S. Ct. at 1117. After this enactment only passports issued by the Secretary were "valid passports." The statutory definition of "passport" in 8 U.S.C. § 1101 (a) (30), *supra*, when read in conjunction with § 211a, makes it clear that the Secretary is the only "competent authority" who may issue a valid passport. 8 U.S.C. § 1101 (a) (30) defines "passport" in terms of entry of its bearer into "a foreign country." The passports issued to the defendants were valid "for the entry of the bearer into *a* foreign country" (emphasis added), though, as contended by the Government, they may not have been valid for entry into a *particular* foreign country, namely Cuba. Were there an act of Congress making it a crime for a citizen to *enter* Cuba without a valid passport and had [fol. 296] the defendants been indicted for a violation thereof, this definition in 8 U.S.C. § 1101 (a) (30) would be applicable, subject only to its surviving judicial scrutiny upon constitutional grounds.

The Form of Passports Issued by the Secretary

The first page of a passport issued by the Secretary indicates what a passport is:

"The Secretary of State
of The
United States of America

hereby requests all whom it may concern to permit the citizen(s) of the United States named herein to pass without delay or hinderance and in case of need to give said citizen(s) all lawful aid and protection."

On the inside of the front cover appears a printed notice to the effect that it is not valid until signed by the person to whom it is issued:

"IMPORTANT

This passport is NOT VALID until signed BY THE BEARER on page two."

On the inside of the back cover it contains a printed warning as to the consequences of its use in violation of the conditions or restriction contained therein:
[fol. 297]

"VIOLATION OF CONDITIONS OR RESTRICTIONS

If you use or attempt to use this passport in violation of the conditions or restrictions contained in it, you may lose the protection of the United States while you continue to reside abroad, and you may be liable for prosecution (Section 1544, Title 18, U.S. Code)."

Only following the January 1961 amendment of the Secretary's regulations and his press release, *supra*, did passports include a stamped notice (as did those of the defendants Martinot and Schlosser) that one who *travels to or in* a proscribed area "*may be* liable for prosecution" not only under Section 1544, Title 18, U.S. Code" but also under "Section 1185, Title 8, U.S. Code."

It would appear that, during all of the time that section 1185 and its predecessor were in effect (prior to

January 16, 1961), the Secretary's administrative interpretation of applicable law was that 18 U.S.C. § 1544 was the only criminal sanction enacted by Congress for the use of a passport "in violation of the conditions or restrictions therein contained" and did not consider section 1185 or its predecessor applicable.

One can understand the refusal of the Secretary to issue a passport to or validate a passport of one who intends [fol. 298] to use it upon entry into a country with which the United States does not maintain diplomatic relations. Since we are not on speaking terms with such a country, the Secretary does not desire to make any requests of "all whom it may concern" in that country. It does not follow that a passport "not valid" for purposes of the Secretary's request to "all whom it may concern" is not valid for purposes of departure from and entry into the United States.

Departure Procedure

Before one boards an airplane at Kennedy Airport on a flight to Europe, for example, he must exhibit an unexpired passport issued to him by the Secretary. No employee of any United States government agency examines such passports. Rather, they are exhibited to and examined by employees of the airline at its departure counter. 8 U.S.C. § 1221(b) mandates the commanding officer of an aircraft taking on passengers at any port of the United States, who are destined to any place outside the United States, to file with the immigration officer "before departure" a list of all such persons in such form and containing such information "as the Attorney General shall prescribe by regulation as necessary for the identification of the persons so transported and for the enforce-[fol. 299] ment of the immigration laws." (It is to be recalled that section 1185 is a section of the "immigration laws.") Until this requirement is complied with, no commanding officer of such an aircraft "shall be granted clearance papers for his . . . aircraft." As to aircraft which are determined to be making regular trips to the United States, "the Attorney General may, when expedient, arrange for the delivery of lists of outgoing persons at a later date."

The Attorney General's regulations prescribe that a manifest be executed on Form I-94. As to American citizens departing from the United States, only the name, nationality, United States address and passport number of the passenger, in addition to identification of the flight, are required. Presentation of this manifest to the immigration officer at the port of departure may be deferred "for a period not in excess of 30 days." 8 CFR § 231.2 (1965 rev.). The record indicates that the manifests of those aboard the several aircraft on which the defendants and the other members of the group departed from the United States were not so presented by the respective airlines until the day after their respective departures. In effect, the Attorney General has delegated to the commercial airlines the duty of preventing departure from [fol. 300] the United States without a valid passport. Form I-94 suggests that a passport is valid for departure if issued by the Secretary and not yet expired. There is nothing in the Attorney General's said regulations which equates departure from the United States with entry into an area proscribed by the Secretary. All that his regulations require of a citizen who is to depart from the United States is that he be the bearer of an unexpired passport issued by the Secretary.

If section 1185(b) means what the Government now contends, this practice as to the departure of citizens from the United States falls woefully short of "the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act [§ 1185] and this proclamation" enjoined "upon all officers of the United States charged with the execution of the laws thereof" by President Truman in Proclamation 3004 of January 17, 1953.[39] If, on the other hand, section 1185(b) is what it purports to be, *i.e.*, a departure and entry statute, this departure procedure comports with "the immigration laws," and the provision of § 1185(c) thereof, subjecting the aircraft to forfeiture, is not as Draconian as it might otherwise be.

[fol. 301] *When is the Crime Committed?*

If section 1185(b) is more than a departure statute; if the ultimate destination of a passenger, rather than

his departure from the United States, comes within this criminal statute, when is the crime committed? The Government contends that it is committed the moment a citizen departs from the United States with the intention of ultimately going to a proscribed area. If, for example, a citizen so departed with the intention of entering Cuba but changed his mind after he arrived in London or Paris and did not continue on to Cuba, he would nevertheless have violated this criminal statute, according to the Government. He would have committed what the Government characterizes as "a technical violation." The Government refused to take a position in the supposititious case of a citizen who departs from the United States with no intention of continuing on to Cuba but, after arrival in London or Paris, changes his mind and does so proceed.

Doubts as to the Applicability of section 1185(b) as a "travel to" statute

The Special Committee of the Association of the Bar of the City of New York To Study Passport Procedures, composed of distinguished partners of some of the out-[fol. 302] standing law firms in New York City and Adrian S. Fisher, now chief reporter of the American Law Institute's Restatement of the Foreign Relations Law of the United States, published its report in 1958. After considering all of the federal statutes (including section 1185) prescribing penalties for violations of travel restraints, it came to the following conclusion:

> "The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case." [40]

The Department of State issued a press release on May 1, 1952, announcing that it was taking additional

steps "to warn American citizens of the risks of travel in Iron Curtain countries by stamping all passports not valid for travel in those countries unless specifically endorsed by the Department of State for such travel." Nevertheless, in that press release "the Department emphasized that this procedure in no way forbids American travel to those areas." [41] This press release implies a recognition by the Secretary that his regulations, as reflected in passports stating that they are not valid for travel to or in a particular area, may, as a practical matter, constitute an obstacle but not a barrier to such [fol. 303] travel. As I read the opinion of the Supreme Court in *Zemel, supra*, it held merely that, when Congress enacted 22 U.S.C. § 211a, it authorized the Secretary to impose area restrictions and to refuse to validate a United States passport for travel to any such area. The Supreme Court did not pass upon the question of whether the exercise of this power, which it read into section 211a, constitutes not only an obstacle but also a barrier, *i.e.*, whether the Secretary has the further power to forbid travel by a United States citizen to such an area and, thereby, to make such travel a crime within the scope of 8 U.S.C. § 1185(b). "But whether or not the new legislation was intended to attach criminal penalties to the violation of area restrictions, it certainly was not meant to cut back upon the power to impose such restrictions." *Zemel, supra*, 381 U.S. at 12, 85 S.Ct. at 1278.

In May 1956, R. W. Scott McLeod, Administrator of the Bureau of Security and Consular Affairs of the Department of State, testified before Subcommittee No. 1 of the House Committee on the Judiciary with reference to the Immigration and Nationality Act of 1952, *supra*. By this time a number of cases concerning passport denials were either pending or had been decided at the district court and circuit court levels.[42] Mr. McLeod, in dis- [fol. 304] cussing the Act, including section 1185, said in substance that, in his opinion, a United States citizen may leave the United States without any passport for any part of the Western Hemisphere (including Cuba, since the Secretary's amendment to 22 CFR 53.3(b) was not made until 1961); that having so departed, the citizen

may travel elsewhere subject only to the laws of the country of his destination:

> "As has been noted, you may leave the United States for any part of the Western Hemisphere without a passport. True, if it is your intention to transit other parts of the Western Hemisphere and to go outside of it, under our law you are required to have a passport; but for those who would circumvent the law, certainly the opportunity exists to travel without a passport. And once they have left the United States, any inhibitions on travel abroad are not as a result of our laws, but the laws of other countries." [45]

This view was not shared by the court in *United States* v. *Travis*, *supra*. Nevertheless, it does reflect administrative interpretation of the scope of section 1185(b) by the Department of State.

On June 16, 1958, the Supreme Court handed down its opinion in *Kent* v. *Dallas*, *supra*. The decision in *Kent* turned upon the question as to whether § 1185 and § 211a delegated to the Secretary authority to deny passports to the plaintiffs upon the ground that they were Communists. [fol. 305] The Court approached the problem from the standpoint of the fundamental "exercise by an American citizen of an activity [the right to travel] included in constitutional protection," stating that it:

> "[would] not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. . . . And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. *If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress.* . . . And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. . . . Where activities or enjoyment, natural and often necessary to the fell-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. . . . They may or may not be Communists. But

assuming they are, the only law which Congress has passed expressly curtailing the movement of Communists across our borders has not yet become effective. It would therefore be strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations. . . . We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement." 357 U.S. at 129-130, 78 S.Ct. at 1120. (Emphasis added.)

[fol. 306] "We need not decide the extent to which it can be curtailed." 357 U.S. at 127, 78 S.Ct. at 1119."

On July 7, 1958, less than one month after this decision, President Eisenhower sought to enlist "the lawmaking functions of the Congress" in a special message seeking legislation which would grant to the Secretary "clear statutory authority to prevent Americans from *using passports for travel to areas* where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United States." H.R. Doc. No. 417, 104 Cong. Rec. 11849, 1958 U.S. Code, Cong. and Admin. News, 85th Cong. 2d Sess. 5465. (Emphasis added.) The Secretary drafted a proposed bill to carry out the President's recommendations, which was introduced as H.R. 13318 by Congressman Keating of New York. It proposed to consolidate all federal law relating to passports into the "Passport Act of 1958." Section 402 thereof would have prohibited *"travel to or in any country or area* which to his [the holder of a United States passport] knowledge has been designated by the Secretary of State" as an area inappropriate for travel by United States citizens. (Emphasis added.) One who violated this pro-

vision would be guilty of a misdemeanor. This, obviously, [fol. 307] was to be a "travel to" statute, supplementary to section 1185, a departure statute. Understandably, therefore, section 602 of this bill provided:

> "602. Nothing in this Act shall be construed to limit, amend or repeal the provisions of section 215 of the Act of June 27, 1952, chapter 477, title II, chapter 2, (8 U.S.C. sec. 1185)."

The House Committee on Foreign Affairs considered this bill. It did not report it out because it felt that the Secretary's bill was too broad.[45] This statutory authority sought by the Secretary but not granted by the Congress is the very power claimed by the Government in the instant case.

22 U.S.C. § 211a is a passport statute. 8 U.S.C. § 1185, is, by its terms, a departure statute. This distinction must be recognized. It has been recognized by the Department. It submitted written replies to questions put to one of its representatives, who appeared before the House Committee on Foreign Affairs in 1958 when it was considering a bill (S. 2770), introduced by Senator Fulbright of Arkansas:

> "The Department believes that passports should be denied, even in peacetime and in the absence of a national emergency, to law violators and to Communist supporters, whether or not passports are required for departure from the United States. *The problem here lies in the distinction between passport* [fol. 308] *issuance and the control of travel, two concepts which are intermingled throughout the Fulbright bill but which are separate under existing law and which in our belief should remain separate.*" [46] (Emphasis added.)

Several other bills were introduced which sought to empower the President to restrain the travel of United States citizens and to limit the validity of passports which respect to travel to certain countries or areas declared by the President to be "off limits" and to prohibit travel to any such country or area. H.R. 9069, 86th Cong., 1st Sess. (1959) sought to restrain travel by an amendment

to § 211a. The favorable report of the Committee on Foreign Affairs considered this bill as one which would add specific statutory authority for the President to restrain travel.[47] It was not enacted into law. Another bill, H.R. 388, 87th Cong., 1st Sess. (1961), proposed to amend section 1185(b) so as to add a provision making it "unlawful for any citizen of the United States to . . . (2) travel to any country in which his passport is declared to be invalid. . . ."[48] It was not enacted into law. H.R. 9045, 88th Cong., 1st Sess. (1963) would have amended section 1185(b) by adding to the departure and entry provisions thereof, as further crimes by United States citizens:

> "(2) *travel to, enter or travel in* or through any country or area, unless he bears a passport spe-
> [fol. 309] cifically endorsed for and authorizing such travel or entry therein; or
> (3) *travel to, enter, or travel in* or through any country or area to which travel by United States citizens has been prohibited by the President." (Emphasis added.)

This bill was not enacted into law. H. R. 11621, 88th Cong., 2d Sess. (1964) would have added a new section to 8 U.S.C., immediately following section 1185. Thus the departure and entry statute, section 1185, would have remained in effect. A new section would have related to entry into a proscribed area, for a violation of which the penalty would be a fine of up to $10,000 or imprisonment of up to two years, or both. This bill was not enacted into law, nor was an identical bill, H.R. 11603, 89th Cong., 1st Sess. (1964).

S. 806, 86th Cong., 1st Sess. (1959), introduced by Senator Humphrey "(for himself, Mr. Anderson, Mr. Chavez, Mr. Hennings, Mr. Morse, Mr. Neuberger and Mr. Symington)" reflected a more liberal attitude toward the right of United States citizens to travel. It would have repealed § 1185(b) and other statutes inconsistent with the Humphrey bill; would have subjected the right to travel only "to the war power granted to the President and the Congress"; would have authorized the Sec-

retary to refuse or limit the issuance of passports only [fol. 310] (1) following a declaration of war by the Congress, (2) following the outbreak of hostilities in which the Armed Forces of the United States participate or (3) upon the application of a person under indictment, information or sentence for the commission of a felony. As to area restrictions under other circumstances (such as lack of diplomatic relations), the President would be empowered only to determine that the United States may not be able to give its usual protection to citizens travelling in designated areas. In the event of such a determination, it would devolve upon the Secretary to so inform each passport applicant. Nevertheless "The President shall not forbid travel in these areas by persons under this Act." This bill acknowledges the distinction between the designation of an "off limits" area, on the one hand, and the right of a citizen to enter such an area at his own risk. It was drafted (as it stated) with a realization and proposed finding "that freedom of movement is basic in the scheme of American institutions" and that "the crucial function of a passport is control over entry or exit." This is what the Supreme Court said in *Kent* v. *Dallas*, *supra*. This bill, likewise, was not enacted into law."[9]

[fol. 311]

Section 1185(b) is a Criminal Statute

The cardinal principle that a "criminal statute is to be construed strictly, not loosely," *United States* v. *Boston & Maine R.R.*, 380 U.S. 157, 160, 85 S.Ct. 868, 870 (1965), "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *United States* v. *Wiltberger*, 5 Wheat. (18 U.S.) 76, 95 (1820). It requires no further citation to support the equally cardinal principle that the power of punishment is not vested in the executive department. If, arguendo, the use of the pharse "valid passport" in section 1185(b) creates an ambiguity, the court is bound to resolve any ambiguity in favor of the defendants. *Bell* v. *United States*, 349 U.S. 81,

83, 75 S.Ct. 620, 622 (1955). There is a greater compulsion to construe strictly a criminal statute affecting the right of exit which the Supreme Court has classified as "a personal right included within the word 'liberty' as used in the Fifth Amendment." *Kent* v. *Dulles*, *supra*. The Government seeks to read into an exit and entry statute the pronouncement of the Secretary in his press release of January 16, 1961, *supra*.

[fol. 312]

Legislative History Does Not Support the Government's Contention

Nothing in the history of the Act of May 22, 1918, *supra*, the Act of June 21, 1941, *supra*, or 8 U.S.C. § 1185 suggests that they or any of them were anything more than border control statutes regulating departure from and entry into the United States.

The enactment of § 1185 in 1952 has no independent legislative history.[50] However, since § 1185(b) is cast in language almost identical to that of the Acts of May 22, 1918 and June 21, 1941, one may ascertain the intent of the Congress by examining the history of those earlier acts.[51]

The Committee Reports[52] and Congressional Debates[53] at to both the Act of May 22, 1918 and its amendment by the Act of June 21, 1941, clearly indicate that the Congress and the President,[54] in those years respectively, were concerned with the uncontrolled departure and entry of citizens of the United States, who, it was believed, were acting in furtherance of the war efforts of foreign powers and to the detriment of the interests of the United States. A system of border control was necessary.[55] The manner settled upon to control ingress and egress was to require all American citizens to bear passports upon de-
[fol. 313] parture from and entry into the United States. So, in 1918 and then again in 1941, Congress enacted statutes which made unlawful the departure and entry of American citizens without passports. Since, for example, the Secretary of State would not issue a passport to a citizen of the United States who, in 1918, was acting in furtherance of Germany's war efforts, an entry or de-

parture by such citizen without a passport would violate the predecessor of § 1185(b).

Congress recognized that this absolute restriction might work hardships, unnecessarily, on loyal Americans.[56] Therefore, in enacting these statutes, Congress authorized the President to promulgate exceptions to and limitations upon this absolute restriction. The President was authorized to and did except certain categories of persons from the operation of this restriction. Military and naval personnel, as well as other classes of government personnel, were permitted to depart and enter without bearing valid passports.[57] Americans travelling between the United States and Canada, likewise, were not required to be the bearers of valid passports upon departure and entry (this exception was eventually expanded to include the entire Western Hemisphere).[58] When Congress enacted § 1185 in 1952, *these* were the powers of the President as they [fol. 314] existed under the Act of May 22, 1918, as amended by the Act of June 21, 1941.[59]

There is nothing in the history of these Acts from which one may reasonably infer that Congress intended to grant the executive branch of the Government the power to subject to criminal penalties a United States citizen who departs from or enters the United States bearing an unexpired passport issued by the Secretary, even though he travels to an area proscribed by the Secretary.

The Secretary, at least since 1914, has exercised the power to declare passports invalid for use in or travel to specified countries and areas (*i.e.*, to impose area restrictions) and to refuse to validate passports for travel to said countries or areas.[60] This authority stems from 22 U.S.C. § 211a.[61] It clearly does not stem from § 1185 or its predecessor since the Secretary has exercised the power whether or not these statutes were in effect.[62] Furthermore, even while § 1185 has been in effect, the Secretary has not cited it as authority for such restrictions upon the use of passports. On the contrary, when he cited any authority, it was § 211a.[63] The imposition of such restrictions was not limited to instances of war or a national emergency. These two statutes and the regulations and

[fol. 315] restrictions under each of them relate to different problems. § 1185(b) and the regulations thereunder are directed against the subversive transference of military information and espionage for foreign enemy governments by citizens of the United States during time of war or national emergency.[64] The regulations under § 211a, *i.e.*, the "travel to" restrictions, are directed toward preventing American citizens from travelling to countries where they may be subject to personal risks (such as countries in which famine or civil war is raging)[65] or travelling to countries in which it will be difficult or impossible for the United States to offer them diplomatic protection,[66] *i.e.*, countries with which the United States does not maintain diplomatic relations.

When the Acts of May 22, 1918 and June 21, 1941, were enacted, "travel to" restrictions were in effect by virtue of regulations issued prior to their effective dates.[67] That these statutes were not intended to encompass or embrace the "travel to" restrictions of these regulations is clear from the language of the statutes. These statutes were to become effective when "the President shall find . . . that restrictions and prohibitions *in addition to those provided otherwise than by this Act,*" were necessary. [fol. 316] Further, § 1185 and its predecessor were only to become effective when the President found that additional restrictions and prohibitions should "be imposed upon the *departure of persons from and their entry into the United States,*" not additional restrictions as to countries Americans would be permitted to visit.

If the Congress, by enacting § 1185(b) and its predecessor, intended to prohibit travel to proscribed areas as well as to prohibit departure and entry without passports, one may reasonably wonder why the Congress did not expressly provide for such a prohibition. The principle that when the Congress "has the will it has no difficulty in expressing it," *Bell* v. *United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622 (1955), is pertinent. For, in 1939, two years prior to the Act of June 21, 1941, Congress, by joint resolution, The Neutrality Act of 1939, 54 Stat. 4, 7, 11, specifically gave the President the authority to prohibit travel of Americans to certain areas to be

designated either by the President or one to whom he delegated this power. Sections 1(a), 3, 12. It provided, further, for criminal penalties for a violation of the President's "travel to" restrictions.[8] The Neutrality Act of 1939, was still in effect when the predecessor of § 1185 (b) was enacted in 1941.[9] There is nothing to indicate [fol. 317] that the Congress intended, *sub silentio*, to include these "travel to" restrictions, imposed under this act, in the departure and entry statute, the border control statute it enacted two years later.

CONCLUSION

The court finds that the defendants Laub and Martinot departed from and entered the United States bearing valid passports within the meaning of "depart," "enter" and "valid passport" in 8 U.S.C. § 1185(b); that, although they and the defendant Schlosser agreed among themselves and with the other alleged co-conspirators named in the indictment to induce others to do likewise and acted in furtherance thereof, the said agreement and the said acts do not constitute a crime under 18 U.S.C. § 371. If, as the court concludes, there is a gap in the law, the right and the duty, if any, to fill it devolves upon the legislative, not the executive or judicial, branch of the Government.

This opinion constitutes the court's findings of fact and conclusions of law. Settle any further proposed findings and conclusions and a proposed order on or before fifteen (15) days from the date hereof.

/s/ Joseph C. Zavatt
Chief Judge

[fol. 318] FOOTNOTES

[1] "§ 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

* * * *

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

* * * *

Citizens

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

Penalties

(c) Any person who shall willfully violate any of [fol. 319] the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both;

and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle, vessel, or aircraft together with its appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States."

[2] The defendant Schlosser was not charged with departure and entry because, despite his participation in the alleged conspiracy, he decided in late May or early June 1963 that discretion was the better part of valor and, in the language of the defendant Luce, "chickened-out." He had spoken to many lawyers and had become befuddled as to the possible legal consequences of the trip. He feared that it would result in arrest and expressed the opinion that the issue that would be raised by the trip to Cuba was not revolutionary enough to be arrested for.

A severance of the defendant Luce was granted, Fed. R. Crim. P. 14, and the trial proceeded to the court without a jury as to the defendants Laub, Martinot and Schlosses.

[3] See note 1, *supra*.

[4] "§ 1542. False statement in application and use of passport

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or

[fol. 320] Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 771."

See *Browder* v. *United States*, 312 U.S. 335, 61 S.Ct. 599 (1941); *Warszower* v. *United States*, 312 U.S. 342, 61 S.Ct. 603 (1941).

[5] "SUBCHAPTER II.—REGISTRATION OF FOREIGN PROPAGANDISTS

* * * *

§ 612. Registration statement; filing, contents

(a) No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required by this section and subsection (b) of this section or unless he is exempt from registration . . . .

* * * *

§ 618. Enforcement and penalties

(a) Any person who—

(1) willfully violates any provision of this subchapter or any regulation thereunder, . . .

shall, upon conviction thereof be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both."

[6] No. C 44149, issued by the Department on June 11, 1962. Its terms will be considered later in this opinion.

[7] No. C 719424, issued October 23, 1962. Its terms will be considered later in this opinion.

[fol. 321] [8] The record is silent as to the owner or tenant of this apartment.

[9] The period of passport validity is three years from its date. It may be renewed for a further period of two years. 22 U.S.C. § 217a.

[10] No passport was required for such a visit. See note 28, *infra*.

[11] Laub, Martinot and Schlosser declined to produce their passports at the trial. No copies thereof were produced by the Government. Findings as to passport numbers, dates of issue and terms and conditions thereof are based upon stipulations of fact made in open court on the record.

[12] On May 20, 1963, Luce applied for a passport. He stated that "Education" was the purpose of his trip; that

"France, England and Other Countries" were to be visited; that June 20, 1963 was the approximate date of his departure; that he was "Undecided" as to the proposed length of his stay abroad and as to whether he would travel in an organized tour. The Department issued passport number D 396677, dated May 23, 1963.

[13] Testifying before the House Committee on Un-American Activities in September 1963, Laub admitted to having visited the following colleges and universities in organizing and recruiting students for the June 1963 trip:

University of California, Berkeley, California.
San Francisco State College, San Francisco, California.
Stanford University, Palo Alto, California.
University of Chicago
University of Wisconsin
University of Michigan
Brooklyn College
City College
Columbia College

Hearings Before the Committee on Un-American Activities, House of Representatives, 88th Cong., 1st Sess., pt. 3, at 718 (1963).

[fol. 322] [14] "How shall I know, unless I go
To Cairo and Cathay,
Whether or not this blessed spot
Is blest in every way?

Now it may be, the flower for me
Is this beneath my nose
How shall I tell, unless I smell
The Carthaginian rose?"

Millay, A Few Figs From Thistles 13 (1st ed. 1922).

[15] "Spark—Western Voice For Revolution," issue of June 1965, Vol. 1, No. 4, at page 2, describes itself as the "Western newspaper of the Progressive Labor Party" and among its "dedicated tasks" states:

"Above all, fight for a new way of life in which the working people will own and control all factories,

> banks, mines, ships, railroads, land and other productive property; a new way of life in which working people will run the police, courts and all other divisions of government."

In that issue, at page 2, it reports the founding of "a new communist party—the Progressive Labor Party" and quotes from the key-note speech of its President: "Altering capitalism to suit the needs of the people has not, does not and cannot work."

It includes, at page 6, what purports to be the full text of a speech made by "Levi Laub, National Student Coordinator of the Progressive Labor Party."

[16] Hearings Before the Committee on Un-American Activities, House of Representatives, 88th Cong., 1st Sess., pt. 1, at 384 (1963).

[17] Letter to John W. Crisfield, June 26, 1862. Francis D. Tandy Co., Lincoln's Complete Works, Vol. VII, 237 (1905); Shaw, The Lincoln Encyclopedia 63 (1950).

[18] See note 9, *supra.*

[fol. 323] [19] The Government did not appeal from the remand to the District Court for the discharge of the appellant.

[20] Judge Crary's letter to me dated January 4, 1966 [1965]:

> "The passport she had three years prior to the dates in question had expired and was therefore invalid as of the pertinent dates. So far as the record shows, she had an expired United States passport when she went to Mexico and from there to Cuba."

[21] "§ 211a. Authority to grant, issue and verify passports

The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

[22] Proclamation 2914
Proclaiming the Existence of a
National Emergency

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and . . .

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we [fol. 324] may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace."

President Truman later proclaimed that this national emergency still existed on January 17, 1953, in his Proclamation 3004 of that date. 67 Stat. C31, 3 CFR 180 (1949-1953 Comp.).

[23] Executive Order No. 10861, February 11, 1960, 3 CFR 396 (1959-1963 Comp.) and Executive Order No. 10905, January 14, 1961, 3 CFR 436 (1959-1963 Comp.).

[24] Executive Order No. 11037, July 20, 1962, 3 CFR 621 (1959-1963 Comp.).

[25] In *Zemel* v. *Rusk*, 228 F. Supp. 65, 72 (D. Conn. 1964), the court said that the national emergency proclaimed by President Truman in 1950 still continued. The Supreme Court did not question the existence of the national emergency so proclaimed, when it heard and decided *Zemel*.

[26] After citing section 215 of the Immigration and Nationality Act as his authority to impose restrictions, his 1950 proclamation of a national emergency and the need of additional restrictions "upon the departure of persons from and their entry into the United States" and that

"the interests of the United States" require additional restrictions, the President prescribed rules, regulations and orders with respect thereto:

"I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State [fol. 325] and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * * *

[A]nd the provisions of this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, shall be in addition to, and shall not be held to revoke, supersede, modify, amend, or suspend, any other proclamation, rule, regulation, or order heretofore issued relating to the departure of persons from, or their entry into, the United States; and compliance with the provisions of this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, shall not be considered as exempting any individual from the duty of complying with the provisions of any other statute, law, proclamation, rule, regulation, or order heretofore enacted or issued and still in effect.

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that

purpose the services of their respective officials and agents. I enjoin upon all officers of the United States [fol. 326] charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation." 3 CFR 180-81 (1949-1953 Comp.).

[27] "§ 53.2 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States *shall depart from or enter* into or attempt to depart from or enter into any part of the United States as defined in § 53.1, *unless he bears a valid passport which has been issued by or under authority of the Secretary of State* or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 *Exceptions to regulations in § 53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

* * * * *

(b) When traveling between the United States and any country or territory in North, Central, or South America *or in any island adjacent thereto: Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto:" 22 CFR (1958 rev.). (Emphasis added.)

[fol. 327] [28] "§ 53.3 *Exceptions to regulations in § 53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

* * * * *

(b) When traveling between the United States and any country, territory or island adjacent thereto in North,

Central, or South America, excluding Cuba: . . ." 26 Fed. Reg. 482-83, 22 CFR 53.3. (1965 ed.).

[29] "126. The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to these rules and not inconsistent therewith."

[30] See note 21, *supra*.

[31] "§ 151c. Rules and regulations; promulgation by Secretary; delegation of authority

The Secretary of State may promulgate such rules and regulations as may be necessary to carry out the functions now or hereafter vested in the Secretary of State or the Department of State, and he may delegate authority to perform any of such functions, including if he shall so specify the authority successively to redelegate any of such functions, to officers and employees under his direction and supervision."

[32] "Department of State

(Public Notice 179)

United States Citizens

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the [fol. 328] absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba, their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this Order is revoked.

Dated: January 16, 1961

For the Secretary of State
Loy Henderson,
Deputy Under Secretary for Administration."

[33] Partridge, Origins, A Short Etymological Dictionary of Modern English 461 (2d ed. 1959); Hunt, The American Passport (Department of State, 1898).

[34] "CHAP. 81. An Act To prevent in time of war departure from or entry into the United States contrary to the public safety.

. . . [W]hen the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise [fol. 329] than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—. . .

Sec. 2. . . . except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, . . . for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport."

[35] "The American passport is a document of identity and nationality issued to persons owing allegiance to the United States and intending to travel or sojourn in foreign countries. It indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and requests on the part of the Government of the United States that the officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection. It has no other

purpose." 3 Hackworth, Digest of International Law 435 (1942).

[36] See Hunt, *op cit. supra*, note 33 at 1-6; Riesman, *Legislative Restrictions on Foreign Enlistment and Travel*, 40 Colum. L. Rev. 793, 815-22 (1940); testimony of R.W. Scott McLeod, Administrator, Bureau of Security and Consular Affairs, Department of State, Hearings Before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, 84th Cong., 2d Sess., on H.R. 9991, ser. 24, at 4-10 (1956); Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, Freedom To Travel 18-22 (1958).

[37] See The Right to Travel and United States Passport Policies (a staff study prepared for the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate), Senate Doc. No. 126, 85th Cong., 2d Sess. (1958).

[fol. 330] [38] "§ 1544. Misuse of passport

Whoever willfully and knowingly uses, or attempts to use, any passport issued or designed for the use of another; or

Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports; or

Whoever willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both."

[39] See note 26, *supra*.

[40] Freedom To Travel 70 (1958).

[41] Hearings Before Senate Foreign Relations Committee on Department of State Passport Policies, 85th Cong., 1st Sess., at 3 (1957).

[42] *Dulles* v. *Nathan*, 129 F. Supp. 951 (D.D.C. 1955). See also 225 F.2d 29 (D.C. Cir. 1955); *Shachtman* v. *Dulles*, 225 F.2d 938 (D.C. Cir. 1955); *Robeson* v. *Dulles*,

98 U.S. App.D.C. 313, 235 F.2d 810 (D.C.Cir.), *cert. denied*, 352 U.S. 895, 77 S.Ct. 131 (1956); *Boudin* v. *Dulles*, 136 F.Supp. 218 (D.D.C. 1955), *modified* 235 F.2d 532 (D.C.Cir. 1956); *Kent* v. *Dulles*, pending in the D.C. Circuit Court of Appeals 1956, see 248 F.2d 600 (1957); *Briehl* v. *Dulles*, pending in the D.C. Circuit Court of Appeals in 1956, see 248 F.2d 561 (D.C.Cir. 1957).

[43] Hearings, 84th Cong., 2d Sess., on H.R. 9991, ser. 24, at 4 (1956).

[44] The Court was referring to section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. § 785, which was later held unconstitutional in *Aptheker* v. *Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659 (1964).

[fol. 331] [45] See H.R. Rept. No. 2684, 85th Cong., 2d Sess. 4 (1958).

[46] Hearings Before House Committee on Foreign Affairs, 85th Cong., 2d Sess. 28 (1958).

[47] "*Geographical limitations.* The bill adds to existing law specific authorization for the President to restrain the travel of all citizens and limit the validity of all passports for designated areas." H.R. Rept. No. 1151, 86th Cong., 1st Sess. 4 (1959).

[48] The present prohibition against departure from and entry into the United States without a valid passport was to remain in § 1185(b).

[49] Many other bills have been introduced in the Congress relating to area restrictions, passport control in general, members and supporters of the International Communist movement—none of which has been enacted into law.

[50] Only one statement about this section appears in the House Report.

"The powers of the President to provide additional prohibitions and restrictions on the entry and departure of persons during time of war or the existence of a national emergency are incorporated in the bill (sec. 215) in prac-

tically the same form as they now appear in the act of May 22, 1918 (40 Stat. 559)." H.R. Rept. No. 1365, 82d Cong., 2d Sess. 53 (1952).

[51] See *Kent* v. *Dulles*, 357 U.S. 116, 137, 78 S.Ct. 1113, 1124 (1958) (dissenting opinion); *United States* v. *Plesha*, 352 U.S. 202, 205, 77 S.Ct. 275, 277 (1957).

[52] H.R. Rept. No. 485, 65th Cong., 2d Sess. (1918); S. Rept. No. 444, 77th Cong., 1st Sess. (1941).

[53] See 56 Cong. Rec. 5969-70, 6029-31, 6062, 6064-68, 6192-93, 6195, 6246-47 (1918); 87 Cong. Rec. 4806, 5047-49, 5052 (1941).

[54] H.R. Rept. No. 485, 65th Cong., 2d Sess. 2 (1918). See also Annual Report of the Attorney General of the [fol. 332] United States for the Year 1917, 16 (1917).

[55] See *e.g.*, H.R. Rept. No. 485, 65th Cong., 2d Sess. 2, 3 (1918); S. Rept. No. 444, 77th Cong., 1st Sess. (1941); 87 Cong. Rec. 5047-49 (1941).

[56] 56 Cong. Rec. 6029-31, 6062, 6065, 6193, 6246-47 (1918).

[57] See *e.g.*, Exec. Order No. 2932, August 8, 1918, Laws Applicable to Immigration and Nationality 1050 (1953 ed.).

[58] *Ibid.* See also Exec. Order No. 3326, Sept. 17, 1920, *id.* at 1065; 22 CFR 58.3 (1941 Supp.); 22 CFR 53.3 (b) (1958 rev.).

[59] See note 50, *supra.*

[60] See Dep't of State, Circulars Relating to Citizenship —1915, 48 (1915).

[61] *Zemel* v. *Rusk*, *supra.* See also Exec. Order No. 7856, 3 Fed. Reg. 681 (1938). Prior to the Supreme Court decision in *Zemel* v. *Rusk*, a number of lower courts had concluded that the power to impose area restrictions on passports, and to refuse to validate passports for travel to restricted areas, was granted by § 1185. See *e.g.*, *Worthy* v. *Herter*, 270 F.2d 905, 912 (D.C. Cir.), *cert. denied*, 361 U.S. 918, 80 S.Ct. 255 (1959); *MacEwan* v.

Rusk, 228 F.Supp. 306, 310-12 (E.D. Pa. 1964), *aff'd*, 344 F.2d 963 (3d Cir. 1965). The District Court in *MacEwan* went further, concluding that travel to Cuba without a specially validated passport would violate § 1185. 228 F.Supp. at 315 (civil suit). See also *United States* v. *Healy*, 376 U.S. 75, 84 S.Ct. 553 (1964) (dictum). The Supreme Court, however, in *Zemel*, purposefully refused to reach either of these conclusions, specifically holding that "area restrictions" were authorized by § 211a.

[62] See note 60, *supra*. See also 3 Hackworth, Digest of International Law 531-33 (Spain and China); 4 Fed. Reg. 176 (Europe).

[63] See *e.g.*, Public Notice 179, 26 Fed. Reg. 492 (1961) (Cuba).

[fol. 333] [64] H.R. Rept. No. 485, 65th Cong., 2d Sess. 2, 3 (1918):

> "That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined."

87 Cong. Rec. 5047-48 (1941):

> "Since the outbreak of the present war in Europe the Department of State has from time to time given consideration to the desirability of the modification of the act of May 22, 1918 . . . . in such a manner as to permit the President at a time such as the present, to prescribe rules and regulations governing the

entry into and the departure from the United States of all persons, if he deems that the interests of the United States so require . . . [T]here is no provision of law under which citizens of the United States may be required to bear valid passports in order to depart from or enter the United States or under which the departure from the United States of aliens may be controlled. Since the outbreak of the present war it has come to the attention of the Department of State and of other executive departments that there are [fol. 334] many persons in and outside of the United States who are directly engaged in espionage and subversive activities in the interests of foreign governments, and others who are engaged in activities inimical to the best interests of the United States who desire to travel from time to time between the United States and foreign countries in connection with their activities, as well as others who desire to leave the United States for the purpose of evading justice.

During the last war, when it is believed a lesser number of persons were engaged in espionage and subversive activities *in the United States* than is now the case, notwithstanding the fact that the United States is not at war, it was found desirable to enact legislation to provide for the regulation of travel to and from the United States on the part of all persons, citizens as well as aliens. The situation existing throughout the world and the necessity of promoting as far as possible the national defense justify, it is believed, the enactment of legislation providing for the centralization of control over the entry into and departure from the United States of persons of all classes. It is believed that this could be accomplished by the modification of the first paragraph of the act of May 22, 1918, so that the President could issue rules and regulations governing the entry into and departure from the United States of all persons. . . ." (Emphasis added.)

[11] See *e.g.*, famine in Belgium, 3 Hackworth, *op.cit. supra*, note 62 at 526; civil war in Spain, *id.* at 531-33. See also, Right to Travel 14-18 (1958).

[66] "Generally speaking, the United States will not validate passports for travel to countries with which we do not have diplomatic relations. Americans traveling to such countries cannot be extended the usual protection offered American citizens and property abroad by our embassies and consulates abroad. . . .

* * * *

[fol. 335] In addition to not validating passports for countries with which we have no diplomatic relations, the Secretary of State may, from time to time, decide that the safety of American citizens cannot be fully protected in certain countries."

Statement of Deputy Under Secretary of State, Robert D. Murphy, Hearing Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 1st Sess., pt.2, at 101 (1957).

[67] See notes 60 and 62, *supra*.

[68] "Whenever the President shall have issued a proclamation [that a state of war exists between foreign states] and he shall thereafter find that the protection of citizens of the United States so requires, he shall, by proclamation, define combat areas, and thereafter it shall be unlawful, except under such rules and regulations as may be prescribed, for any citizen of the United States or any American vessel to proceed into or through any such combat area.

* * * *

In case of the violation of this section by any citizen traveling as a passenger, such passenger may be fined not more than $10,000 or imprisoned for not more than two years, or both.

* * * *

The President may, from time to time, promulgate such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out any of the provisions of this joint resolution; and he may exercise any power or authority conferred on him by this joint resolution through such officer or officers, or agency or agencies, as he shall direct."

See also the Act of February 4, 1815, 3 Stat. 195, 199-200 (prohibiting travel to Canada and other British Possessions during the war of 1812).

[fol. 336] [49] Sections 2 (prohibiting commerce with States engaged in armed conflict), 3 (prohibiting travel in combat areas) and 6 (prohibiting the arming of merchant vessels) were repealed by joint resolution on November 17, 1941, 55 Stat. 764. The legislative history of this repealer statute would give no support to an argument that these sections of the said act were repealed because it was felt that the Act of June 21, 1941, covered the same subject. See *e.g.*, 87 Cong. Rec. 7958 (1941); Statement of the Secretary of State before the Committee on Foreign Affairs, House of Representatives, reprinted at 36 Am. J. Int'l L. 118-121 (1942).

[fol. 337]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 64 CR 350

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 20, 1966

I. Notice is hereby given that the United States of America hereby appeals to the Supreme Court of the United States from the final Judgment and Order of the Court entered on May 5, 1966, dismissing as to all the defendants above named the indictment against them by reason of the Court's construction of Title 8, U. S. Code, Section 1185(b) and the regulations thereunder to wit: 22 C.F.R. Sections 53.2, 53.3.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The Clerk will please prepare a transcript of the record in this case, including this notice of appeal, for transmission to the Clerk of the Supreme Court of the United States.

III. The following question is presented by this appeal:

1. Whether the indictment in this case, taken in light of the bill of particulars filed by the government, states facts sufficient to constitute a conspiracy to commit an offense against the United States, i.e., to violate 18 U.S.C. 1185(b) and the regulations issued thereunder.

/s/ Joseph P. Hoey
Attorney for the United States

[fol. 338]

SUPREME COURT OF THE UNITED STATES

No. 1358, October Term, 1965

UNITED STATES, APPELLANT

v.

LEE LEVI LAUB, ET AL.

APPEAL from the United States District Court for the Eastern District of New York.

ORDER NOTING PROBABLE JURISDICTION—June 13, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and is set for oral argument immediately following No. 963.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

LEE LEVI LAUB, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the district court dismissing this indictment (App. A, pp. 5–7, *infra*) is unreported. The opinion of the district court in the related case of *United States* v. *Laub* (App. B, pp. 8–66, *infra*) is not yet reported.

JURISDICTION

By order entered on May 5, 1966, the district court dismissed the instant indictment on the authority of its opinion in the related case of *United States* v. *Laub* (pp. 5–7, *infra*). The United States filed a notice of appeal in the district court on May 20, 1966.

The jurisdiction of this Court is invoked under 18 U.S.C. 3731 on the ground that the dismissal of the indictment was "based upon the * * * construction of the statute upon which" the indictment was founded.

STATUTES INVOLVED

Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b), provides:

> (b) Citizens.
>
> After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

QUESTION PRESENTED

Whether it is a violation of Section 215(b) of the Immigration and Nationality Act of 1952 for a citizen holding an unexpired and unrevoked passport to depart from the United States for a country to which the passport has been marked by the Secretary of States as "not valid."

STATEMENT

Appellees were indicted on September 22, 1964, in the United States District Court for the Eastern District of New York on a charge of having conspired, in violation of 18 U.S.C. 371, to violate Section 215(b) of the Immigration and Nationality Act of 1952, 8

U.S.C. 1185(b), and the regulations thereunder, by agreeing to arrange for the travel to Cuba of citizens of the United States who did not bear valid passports for travel to that country. In response to appellees' request for a bill of particulars, it was alleged that the citizens who had engaged in the travel involved in the indictment possessed unexpired and unrevoked passports which had not been validated by the Secretary of State for travel to Cuba.

Appellees moved to dismiss the indictment for failure to state an offense, and the district court granted the motion. The order of dismissal incorporated by reference the opinion of the same district court in *United States* v. *Laub* (pp. 7, 8–66 *infra*), in which, after a trial, the court had held that Section 215(b) did not make it a criminal offense for a citizen who possessed an unexpired and unrevoked passport to depart the United States with the intention to travel to a country for which his passport was invalid.

THE QUESTION IS SUBSTANTIAL

The issue presented by this case is related to the principal issue involved in *Travis* v. *United States*, No. 963, this Term, certiorari granted, April 18, 1966. The district court distinguished *Travis* on the basis that (p. 31, *infra*), the petitioner there departed from the United States without any passport whatever with the intention of traveling to Cuba,* whereas the appel-

*We have been advised that, in fact, the petitioner in *Travis* possessed a revoked passport at the time of her trip to Cuba. The stipulation on which the case was tried makes no explicit reference, however, to what kind of passport, if any, she possessed.

lees in this case possessed passports which were valid for travel to countries other than those to which travel had been restricted by the Secretary of State. In both *Travis* and this case, however, the central issue is whether Section 215(b) of the Immigration and Nationality Act of 1952 imposes a criminal sanction upon a citizen who departs the United States with the intention of traveling to a country as to which area restrictions have been imposed. We believe it would be appropriate for the Court to hear and decide this case together with *Travis*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted and this case set for argument together with *Travis* v. *United States*, No. 963, this Term.

THURGOOD MARSHALL,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

MAY 1966.

APPENDIX A

United States District Court, Eastern District of New York

Judgment No. 64 CR 350

UNITED STATES OF AMERICA

v.

LEE LEVI LAUB, PHILLIP ABBOTT LUCE, ELLEN IRENE SHALLIT, ALBERT LASATER MAHER, ROGER JAY TAUS, MARTIN ALBRECHT NICOLOUS, MICHAEL DAVID BROWN, CHRISTIAN LEE RAISNER AND PATRICIA ANN SOPIAK, DEFENDANTS

The defendants having been indicted herein on September 22, 1964 for violation of Title 18 United States Code, § 371, in which indictment it is charged that they did unlawfully, wilfully and knowingly conspire and agree together, and with each other, and with divers other persons, to violate Title 8 United States Code, § 1185(b) and the regulations thereunder, to wit: 22 C.F.R. §§ 53.2 and 53.3, in that they did unlawfully, wilfully and knowingly conspire and agree to induce, recruit and arrange for a number of American citizens to depart from the United States for the Republic of Cuba, without bearing valid passports for the Republic of Cuba, that Republic being a place outside of the United States for which a valid passport was required under the aforesaid regulations; and

All of the defendants, except Phillip Abbott Luce, having moved this Court for a Bill of Particulars

requesting that the Government state whether all of the persons, other than the defendants, referred to in the indictment, possessed in or about August, 1963 and continuously thereafter up to and including the date of said indictment, namely, September 22, 1964, unexpired and unrevoked United States passports which, however, had not been specifically validated by the Secretary of State for travel to Cuba, and to which said demand for a Bill of Particulars the Government did not object, and it appearing from the Particulars which were furnished in accordance with the order of this Court entered herein on April 29, 1966 that the persons other than the defendants referred to in the indictment did possess during the aforesaid time period, unexpired and unrevoked United States passports which, however, had not been specifically validated by the Secretary of State for travel to Cuba; and

All of the defendants, except the defendant Phillip Abbott Luce, having moved this Court for an order dismissing the indictment herein on the ground that the indictment does not state facts sufficient to consitute an offense against the United States under Title 18 United States Code, § 1185(b) and the regulations issued thereunder, to wit: 22 C.F.R., §§ 53.2 and 53.3, and the Government having submitted its memorandum in opposition to said motion, and the defendants, except the defendant Phillip Abbott Luce, having appeared by their attorney, Leonard B. Boudin, Esq., in support of said motion, and the United States of America having appeared by its attorney, Joseph P. Hoey, United States Attorney for the Eastern District of New York, by Vincent T. McCarthy, Chief Assistant United States Attorney, in opposition thereto, and the matter having duly come on to be heard before me on the 29th day of

April, 1966 and due deliberation having been had thereon, and the Court construing Title 8 United States Code, § 1185(b) and the regulations thereunder, to wit: 22 C.F.R., §§ 53.2 and 53.3, as it had previously construed them in the case of *United States* v. *Lee Levi Laub, Stefan Martinot and Anatol Schlosser,* No. 64 CR 137, the opinion in which case was filed on April 15, 1966, which opinion was based upon a prior similar conspiracy and which opinion is incorporated herein by reference and made a part hereof with respect to the legal construction of said § 1185(b) and the regulations issued thereunder;

Now, on motion of all of the defendants except the defendant Phillip Abbott Luce, it is

Ordered, adjudged and decreed that the indictment herein is hereby dismissed as to all the defendants named therein as failing to state facts sufficient to constitute an offense against the United States under Title 18 United States Code, § 371, for the reason that the Court construes Title 8 United States Code, §1185(b) and the regulations thereunder, to wit: 22 C.F.R., §§ 53.2 and 53.3, as set forth in the opinion of the Court dated April 15, 1966 in the case of *United States* v. *Lee Levi Laub, Stefan Martinot and Anatol Schlosser,* No. 64 CR 137; and it is further

Ordered, adjudged and decreed that all of the defendants named in said indictment are hereby discharged. Dated: Brooklyn, New York.

May 5th, 1966.

(s) JOSEPH C. ZAVATT,
Chief Judge, U.S. District Court,
Eastern District of New York.

APPENDIX B

United States District Court, Eastern District of New York

64-CR-137

UNITED STATES OF AMERICA, PLAINTIFF

v.

LEE LEVI LAUB, PHILLIP ABBOTT LUCE, STEFAN MARTINOT AND ANATOL SCHLOSSER, DEFENDANTS

April 15, 1966

This case relates to a trip to Cuba made by fifty-eight American citizens who departed from the United States in June 1963 via air transportation out of Idlewild International Airport (now known as Kennedy International Airport and hereinafter referred to as Kennedy Airport); entered Cuba, where they remained for approximately two months; returned therefrom to the United States entering at Kennedy Airport on August 30, 1963.

The defendants were indicted, charged with having conspired among themselves and with Salvatore Cucchiari and Ellen Irene Shallit (named as co-conspirators but not as defendants) to induce, recruit and arrange for the group to depart from the United States for the Republic of Cuba "without bearing a valid passport for the Republic of Cuba," and to violate 8

U.S.C. § 1185(b)[1] and regulations issued thereunder. See notes 27, 28, 32, *infra*. The indictment also

[1] "§ 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

* * * * *

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

* * * * *

Citizens

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

Penalties

(c) Any person who shall willfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned

charges the defendants Laub, Luce and Martinot with having departed from the United States for the Republic of Cuba and with having entered the United States "without bearing a valid passport."[2] For the reasons hereinafter stated, the court is compelled to find the defendants, Laub, Martinot and Schlosser not guilty on the counts of the indictment in and by which they are charged, *i.e.*, Counts One, Three and Five as to the defendant Laub; Counts One, Two and Seven as to the defendant Martinot; Count One as to the defendant Schlosser. The indictment is still pending as to the defendant Luce. See note 2, *supra*.

The evidence on the trial suggests that, had the matter been so presented, a grand jury might well have indicted some or all of the four defendants for (1) having knowingly made false statements in their applications for permission to depart from the United

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for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle, vessel, or aircraft together with its appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States."

[2] The defendant Schlosser was not charged with departure and entry because, despite his participation in the alleged conspiracy, he decided in late May or early June 1963 that discretion was the better part of valor and, in the language of the defendant Luce, "chickened-out." He had spoken to many lawyers and had become befuddled as to the possible legal consequences of the trip. He feared that it would result in arrest and expressed the opinion that the issue that would be raised by the trip to Cuba was not revolutionary enough to be arrested for.

A severance of the defendant Luce was granted, Fed. R. Crim. P. 14, and the trial proceeded to the court without a jury as to the defendants Laub, Martinot and Schlosser.

States, in violation of 8 U.S.C. § 1185(a)(3);[3] (2) for having made false statements in their applications for passports, in violation of 18 U.S.C. § 1542; (3) for having used their passports, the issue of which was secured by reason of false statements, in violation of 18 U.S.C. § 1542;[4] "(4) for having conspired to induce others to make false statements in their applications for passports, in violation of 18 U.S.C. § 1542." The evidence suggests, further, that a grand jury might well have indicted at least the defendant Laub, charging him with having acted as the agent of a foreign principal without having filed a registration statement with the Attorney General, in violation of Subchapter II of Chapter 11 of Title 22, United States Code.[5] Nevertheless, an indictment was sought

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[3] See note 1, *supra*.

[4] "§ 1542. False statement in application and use of passport.

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 771."

See *Browder* v. *United States*, 312 U.S. 335, 61 S. Ct. 599 (1941); *Warszower* v. *United States*, 312 U.S. 342, 61 S. Ct. 603 (1941).

[5] "SUBCHAPTER II.—REGISTRATION OF FOREIGN PROPAGANDISTS

* * * * *

§ 612. Registration statement; filing, contents

(a) No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements there-

and obtained charging the defendants only with alleged violations of 8 U.S.C. § 1185(b) and "the regulations issued thereunder" and with a conspiracy to violate the same.

The Facts

The United States severed diplomatic relations with Castro's Communist Cuba on January 3, 1961. We became aware of Cuba-Russia missile activities in Cuba in October 1962. Pres. Procl. 3504, October 23, 1962, 3 CFR 232 (1959–1963 Comp.). It may or may not be a mere coincidence that the defendants Laub and Martinot organized the so-called "Ad Hoc Student Committee for Travel to Cuba" at a meeting held in an unspecified place in New York City on October 14, 1962; that the defendant Schlosser became identified with this movement shortly thereafter; that, during the missile crisis and in December 1962, the name of the Committee was changed to "Permanent Student Committee for Travel to Cuba"; that the Committee attempted to recruit and organize a group of United States citizens to depart for Cuba in December 1962. This plan aborted when Canada refused them permission to depart therefrom by plane for Cuba. By coincidence the trial of the defendants Laub, Martinot and Schlosser occurred during the mass exodus from Cuba of native citizens who abandoned all of their worldly possessions, separated from

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to as required by this section and subsection (b) of this section or unless he is exempt from registration * * *

§ 618. Enforcement and penalties

(a) Any person who—

(1) willfully violates any provision of this subchapter or any regulation thereunder, * * *

shall, upon conviction thereof be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both."

close relatives and lifelong friends and risked the perils of the sea in small boats in order to escape from the "blessings" of Castro's Communist Cuba for a new birth of freedom in the United States of America. The mass exodus still continues as this opinion is being written.

The intention of the defendants Laub, Martinot and Schlosser to depart from the United States for the purpose of entering Cuba and to induce others to do likewise was open, notorious, with an awareness of 8 U.S.C. § 1185(b), the regulations of the Secretary of State (hereinafter the Secretary), his regulations, his policy declaration of January 16, 1961, *infra*, and the interpretation of § 1185, said regulations and said declaration by the Department of State (hereinafter the Department).

At the meeting of October 14, 1962, those present claimed that there were contradictions in "certain press reports * * * about Cuba"; they expressed their determination to make a trip to Cuba for the alleged purpose of seeing and evaluating the situation and "to attempt to form as objective and as complete an opinion * * * of the Cuban situation" as they could. Five days later, on October 19, 1962, the defendant Schlosser applied in writing to the Department for validation of his passport[4] "for travel to Cuba during the forthcoming Christmas vacation." Having received no reply, he wrote to the Department on November 16, 1962, stating: "I have received and accepted an invitation from the Cuban Federation of University Students to spend my Christmas holidays in Cuba." His request was denied by letter dated November 16, 1962:

[4] No. C 44149, issued by the Department on June 11, 1962. Its terms will be considered later in this opinion.

> "Exceptions to the general policy of limiting travel by United States citizens to Cuba are made only in cases of extreme emergency requiring the immediate presence of the applicant in Cuba. It is not considered that your request comes within the criteria."

Undaunted, Schlosser advised the Department, by letter dated December 5, 1962:

> "Nevertheless, I have accepted an invitation issued by the Cuban Federation of University Students, and I intend to make the trip as originally planned. Therefore, please clarify what is meant by 'general policy.' On what legal grounds is this policy based? what [sic] will be the legal ramifications of my actually making the trip without United States passport validation?"

Whereupon, the Department advised him that its policy with reference to travel to Cuba had been announced on January 16, 1961; that it was "in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations"; that "Travel to Cuba by United States citizens without a passport specifically validated by the Department of State, for that purpose, constitutes a violation of the Travel Control Law and Regulations (Title 8 U.S. Code Sec. 1185, Title 22 Code of Federal Regulations Sec. 53.3)" and called his attention to the maximum penalties for "a wilfull violation of the law."

On November 2, 1962 (three weeks after the meeting of October 14, 1962), the defendant Martinot applied for validation of his passport[7] "for a trip to Cuba over the forthcoming Christmas vacation." "I

[7] No. C 719424, issued October 23, 1962. Its terms will be considered later in this opinion.

am fully cognizant of the present state of relations between the United States and Cuba, but trust that my [sic] the end of December the tension may have subsided sufficiently to permit a more objective view of the situation." This request was denied by a Department letter similar to and bearing the same date as that to Schlosser.

Nevertheless, the plan to make a trip to Cuba in December 1962 was not yet abandoned. Pursuant to an announcement published in the National Guardian, a meeting of the Committee (still known as the "Ad Hoc Committee for Travel to Cuba"), attended by approximately one hundred persons, was held in an apartment at 885 Riverside Drive, New York, N.Y.,[8] on December 15, 1962. There Schlosser read his correspondence with the Department; Laub asserted that, notwithstanding, the December trip would be taken at a cost of only $25 per head (to cover the bus trip from New York City to Canada) and that "the rest of the cost was to be picked up by the Cuban Government." At a press conference held at the Marteen Hotel in Buffalo, N.Y., on December 23rd, however, Schlosser, speaking for the Ad Hoc Committee, announced that the plans for a trip to Cuba were cancelled temporarily but that the Committee would continue in its efforts to visit Cuba.

Soon thereafter steps were taken to recruit applicants and make arrangements for the trip that eventuated in June 1963 and is the subject matter of this case. A passport issued to Laub on May 24, 1960, had not yet expired.[9] Nevertheless, he applied to the New

[8] The record is silent as to the owner or tenant of this apartment.

[9] The period of passport validity is three years from its date. It may be renewed for a further period of two years. 22 U.S.C. § 217a.

York Passport Agency of the Department on January 29, 1963, for a new passport, stating that he intended to depart for Mexico on February 1, 1963, and to remain there for a period of two to three weeks for "vacation and visit."[10] Passport No. D014611 was issued to him the same day. Unlike the passports issued to Martinot and Schlosser, it did not provide that it was not valid for travel to Cuba."[11]

In either February or March 1963, Laub departed the United States, via Mexico, for Cuba where he remained for approximately three weeks and returned to the United States via Prague, Czechoslovakia. The purpose of his trip was to make arrangements for a group visit of United States citizens to Cuba during the summer of 1963, under the aegis of the Permanent Student Committee for Travel to Cuba. While in Cuba Laub obtained an agreement on the part of Cuban officials (1) that the passports of the members of the visiting group would not be stamped upon their entry into and departure from Cuba and (2) that the Cuban government would pay all costs of transportation of the group from New York to Cuba and return as well as the costs of their food, lodging and travel while in Cuba.

An active program to recruit persons for and to organize the June trip got under way. Laub, Martinot, Luce and Schlosser, as well as the alleged coconspirators, Cucchiari and Shallit participated. Meetings, attended by two or more of the defendants were held. Meetings, attended by one or more of the

[10] No passport was required for such a visit. See note 28, *infra*.

[11] Laub, Martinot and Schlosser declined to produce their passports at the trial. No copies thereof were produced by the Government. Findings as to passport numbers, dates of issue and terms and conditions thereof are based upon stipulations of facts made in open court on the record.

defendants, and by prospective recruits, were held. At a meeting held at the Palonia Club, 201 Second Avenue, New York, N.Y., on April 20, 1963, attended by Laub, Martinot and approximately ten to fifteen other persons, Laub invited those present to make the trip and distributed application forms which included the telephone number of Schlosser, where a representative of the Permanent Committee could be reached. Laub held out the prospect of a trip to Cuba, most of the expenses of which would be paid by a group of Cuban students; assured them that their passports would not be stamped in Cuba; referred to a memorandum of law prepared by the American Civil Liberties Union supporting his opinion that a State Department passport validation was not required for the trip; stated that, if those who made the trip were arrested, the American Civil Liberties Union might defend them; outlined the procedure to be followed by those who desired to make the trip.

On a Saturday during the second week of May, Luce visited Schlosser's home at 42 St. Marks Place, New York, N.Y. (having previously received an application blank from Laub), where he discussed his application with Schlosser and Martinot.[11]

While the other defendants occupied themselves with the project in New York, Laub travelled to San Francisco, California, to induce people to join the group. On May 2, 1963, he addressed from fifty to sixty students at the Education Building of San

[11] On May 20, 1963, Luce applied for a passport. He stated that "Education" was the purpose of his trip; that "France, England and Other Countries" were to be visited; that June 20, 1963 was the approximate date of his departure; that he was "Undecided" as to the proposed length of his stay abroad and as to whether he would travel in an organized tour. The Department issued passport number D 396677, dated May 23, 1963.

Francisco State College, at a meeting sponsored by the "San Francisco State College Student Peace Union" and the "Fair Play to Cuba Committee." He explained the project of the Permanent Student Committee; stated that he was travelling around the country" to advise students of the planned trip and that, in his opinion, the trip was lawful. He distributed application forms; advised those interested to apply for passports and list a European country as the place to be visited; stated that most of the expenses would be paid by the Cuban Federation of University Students and announced a meeting to be held on May 4, 1963, in San Francisco at the apartment of one Robert Kaffke, where completed applications would be received and questions about the trip answered. From twenty-five to thirty-five persons attended this meeting. Laub collected applications and $10 application fees. One such, a check to the order of the Permanent Student Committee, was subsequently endorsed for the Committee by Schlosser.

Laub was back in New York City during the latter part of May and proceeded to reserve air transpor-

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[11] Testifying before the House Committee on Un-American Activities in September 1963, Laub admitted to having visited the following colleges and universities in organizing and recruiting students for the June 1963 trip:

University of California, Berkeley, California.
San Francisco State College, San Francisco, California.
Stanford University, Palo Alto, California.
University of Chicago.
University of Wisconsin.
University of Michigan.
Brooklyn College.
City College.
Columbia College.

Hearings Before the Committee on Un-American Activities, House of Representatives, 88th Cong., 1st Sess., pt. 3, at 718 (1963).

tation for the group. He was at the Fifth Avenue, New York, office of British Overseas Airways Corporation (hereinafter BOAC) on May 28th and 31st, seeking reservations for a group departure on any available date between June 25th and 29th. On May 31st he also visited the New York office of Royal Dutch Airlines (hereinafter KLM) to arrange for round trip flights to Paris, via Amsterdam, for other members of the group, the date of departure from Kennedy Airport to be some time between June 25th and July 1st. Those who were to take the trip, he said, were friends who, as children, had pledged to meet some day at the Eiffel Tower in Paris. On June 10th he was at the Ottawa, Canada, office of BOAC, where he paid a $5,000 deposit in United States currency for New York to Paris round trip reservations. The following day he returned to that office and paid the balance of $17,739.20 in United States currency. That day he also visited the Ottawa office of KLM where he paid $13,436.80 in United States currency. A few days later, Laub was back in New York City; visited the KLM office, where he made changes in the number of reservations and received either twenty-two or twenty-three tickets for the group which was to depart from Kennedy Airport on June 25th aboard KLM flight number 606 for Paris via Amsterdam. He was back at the New York City office of BOAC on June 22nd, where he received tickets for a group flight on BOAC flight number 552 departing for London on June 25, 1963, and further transportation of the group to Paris on British European Airways flight number 344. He also picked up a ticket for Martinot on BOAC flight number 558 departing Kennedy Airport for Paris on June 23, 1963. On June 24, 1963, Laub ordered and received his ticket for a Trans-Canada Air Lines

flight to Montreal, Canada, departing June 25, 1963. He already had his ticket for a connecting flight on Air France departing the same day from Montreal for Paris.

The alleged co-conspirator, Salvatore Cucchiari, was in the West Coast area to inform selected participants as to how they were to proceed to New York and what they should do upon arrival there. He arranged for free transportation of two of the travellers by automobile from San Francisco to Philadelphia and instructed them to call a specified telephone number upon their arrival in New York City. These two members of the group later learned that they were caling the apartment of the alleged co-conspirator Ellen Shallit. Upon arrival at her apartment on June 23rd, Shallit requested of each of them the $100 fee which Laub had explained at the May 2nd and 4th meetings in San Francisco. Cucchiari turned up at the Shallit apartment that day.

On the following day, Laub telephoned a prospect in Boston to advise that, if he were still interested in making the trip, he should come to New York City that afternoon and telephone Shallit upon arrival. He did so and, pursuant to Shallit's instructions, went to her apartment. Cucchiari, Shallit, and others who were to make the trip were present at the Shallit apartment. Cucchiari gave instructions as to their conduct and movements until departure time the following day. (By this time the activities of the defendants and their "co-conspirators" were no longer open and notorious). In order to avoid any leak of the actual flight arrangements, Cucchiari told those present that they would be travelling to Cuba via Canada.

On June 23rd Laub had met with and instructed those who were to be group leaders. Those who were

making the trip were to be separated into small groups, each under the supervision of a leader. Each leader was to keep his group confined to an apartment until their departure for the air terminal. Leaders were not to divulge the actual flight route. Rather, they were to inform their groups that they would travel to Cuba via Canada. No members of the group were to speak to any government official who might approach them. Only group leaders would act as spokesmen. No one was to turn over his passport to any government official under any circumstance.

The morning of June 25th had the aspects of a cloak and dagger operation. Small groups met in various apartments, including those of Martinot, Luce and Shallit. In Martinot's apartment, Laub gave final instructions to one group. In Shallit's apartment, final instructions were given to another group by Cucchiari and Shallit. Copies of a press release, prepared in part by Luce and postdated June 26, 1963, were distributed, which restated the alleged objectives of the Permanent Committee and named Laub, Luce, Shallit and Cucchiari as "group representatives." Cucchiari distributed airline tickets to the members of this group. Luce, as leader of a group gathered in his apartment, gave final instructions and collected $300. Laub appeared at Luce's apartment that afternoon accompanied by one Fred Jerome, a leader of the Progressive Labor Party, which Luce described as "a Marxist-Leninist self-avowed Communist Party." Luce delivered the $300 to Laub who left with Jerome.

At about noon of June 25th, the several groups of fellow travellers left the respective apartments for the East Side Airlines Terminal. At the Terminal Laub distributed the airplane tickets to those who had been held incommunicado in Martinot's apartment;

Fred Jerome delivered to Luce the airline tickets for his group; Cucchiari distributed the airline tickets to those who had been held incommunicado in Shallit's apartment. Martinot had departed from Kennedy Airport for Paris two days previously aboard BOAC flight number 558. Laub departed from Kennedy Airport June 25th for Canada (via Trans-Canada Air Lines) and, on the same day, from Canada for Paris (via Air France). The balance of the group (including Cucchiari, Shallit, Kaffke, Luce and his wife) departed the United States from Kennedy Airport via KLM and BOAC, on June 25, 1963.

The exact date of Martinot's arrival in Paris is not revealed. But he was in Paris before the group arrived. Laub and the rest of the group arrived at Orly Airport, Paris, on June 26, 1963. After checking in at one or more hotels for an overnight stop in Paris, the entire group met in a private room in a restaurant. There, in the presence of Martinot, Laub announced that the group would proceed to Prague the next morning via Czechoslovakia National Airlines; that each was free to spend the evening as he chose; that no one should do anything provocative, such as excessive drinking, which might entail difficulties with the police; that the group was in no position to appeal to the American Embassy "to bail us out."

On the morning of June 27, 1963, the entire group checked in at the Czechoslovakia National Airlines counter at Orly. They boarded a specially chartered plane of that airline and arrived at Prague, Czechoslovakia, later that day. Their passports were not stamped upon arrival at or subsequent departure from Czechoslovakia, pursuant to arrangements previously made with Czechoslovakia authorities in Prague by a representative of Cuba. In a waiting room at Prague

Airport, a Vice Consul of the United States read to them a prepared statement advising them that "travel to Cuba by a U.S. citizen without a passport specifically validated by the Department of State for that purpose constitutes a violation of U.S. travel control law and regulations. (Title 8 U.S. Code Sec. 1185; Title 22 Code of Federal Regulations, Sec. 53.3)" and that a wilful violation of the law is punishable by fine and/or imprisonment. The group spent two days at a hotel in Carlsbad. They were addressed by two representatives of the Cuban government, one of whom expressed the pleasure of his government over the fact that young Americans had decided to break the travel ban by going to Cuba.

On the morning of June 29, 1963, the group departed from Prague Airport aboard a Cubana Airlines plane which proceeded to Havana, Cuba (via Shannon, Ireland, and Gander, New Foundland), landing there on June 30, 1963. None of the group displayed his United States passport upon arrival, or upon his subsequent departure from Cuba.

The indictment does not cover the period during which the group was in Cuba. Hence, the activities of the defendants Laub and Martinot and other members of the group were not revealed at the trial. It was stipulated on the record at the trial, however, that the defendants Laub and Martinot departed Cuba August 25, 1963, via Iberian Airlines for Madrid, Spain, with stopovers at Bermuda and the Azores; that they arrived at Madrid on August 26, 1963; that they departed Madrid August 29, 1963, aboard a plane of Iberian Airlines and entered the United States at Kennedy Airport on August 30, 1963.

The committee titles adopted by the defendants who originated the plan to visit Cuba—"Ad Hoc Student Committee" and "Permanent Student Committee"—

would suggest as referents a group of curious, inquisitive, open-minded college youth eager to make an objective, on the spot study of conditions in Cuba. The fact is, however, that the defendants Laub, Martinot and Schlosser (as well as Luce) embarked upon this project with a preconceived conviction that the American press was not giving Cuba a "fair shake," with all that that implies. There was an absence of the yearning to learn by travel "whether or not this blessed spot is blest in every way." [1]

Luce was not a student at any school or college. He had received a B.A. degree in 1958 at Mississippi State University and an M.A. degree at Ohio State University in 1960. In 1961 he abandoned his pursuit of a Ph. D. degree at Ohio State University and came to New York City where he wrote, as he testified, "for a variety of left-wing publications" for a short time. From the fall of 1961 to September of 1964, he was in the employ of the Emergency Civil Liberties Committee as associate editor of its publication, "Rights." Laub had been a student at Columbia College in New York City where he was in his senior year in October 1962. It would appear that he abandoned or at least neglected his college career, became an organizer of the Progressive Labor Move-

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[1] "How shall I know, unless I go
To Cario and Cathay,
Whether or not this blessed spot
Is blest in every way!
Now it may be, the flower for me
Is this beneath my nose
How shall I tell, unless I smell
The Carthaginian rose!"
Millay, A few Figs From Thistles 13 (1st ed. 1922).

ment [15] and devoted a considerable period of his time to the organization of a program to defy the State Department's regulations purporting to restrict travel of United States citizens to Cuba. Robert Kaffke, one who made the trip, was thirty-eight years of age in 1963, hardly in the "student" class. Martinot had been a graduate mathematics student at Columbia University. He and Laub were the organizers of the "Columbia Progressive Labor Student Club." He testified to that effect and admitted to being a Marxist-Leninist before the House Committee on Un-American Activities in May of 1963, prior to his departure for Cuba.[16]

Of the fifty-eight "students" who made the trip, twenty-five to thirty stood up in Havana, Cuba, when Laub asked all members of the Progressive Labor Group to rise. It would appear that the majority of those who made the trip were committed in ad-

[15] "Spark—Western Voice For Revolution," issue of June 1965, Vol. 1, No. 4, at page 2, describes itself as the "Western newspaper of the Progressive Labor Party" and among its "dedicated tasks" states:

> "Above all, fight for a new way of life in which the working people will own and control all factories, banks, mines, ships, railroads, land and other productive property; a new way of life in which working people will run the police, courts and all other divisions of government."

In that issue, at page 2, it reports the founding of "a new communist party—the Progressive Labor Party" and quotes from the key-note speech of its President: "Altering capitalism to suit the needs of the people has not, does not and cannot work."

It includes, at page 6, what purports to be the full text of a speech made by "Levi Laub, National Student Coordinator of the Progressive Labor Party."

[16] Hearings Before the Committee on Un-American Activities, House of Representatives, 88th Cong., 1st Sess., pt. 1; at 384 (1963).

vance to the views and objectives of the left-wing Progressive Labor Party. Considering the intensive campaign waged by the defendants, and particularly Laub; Laub's big-sell at so many of our college and university campuses; the tempting lure of an all-expense trip to and vacation in Cuba—considering all of this, it is significant that the defendants were able to corral such a small group. From the known composition of a majority of the group, it would appear that few, if any, in the group were typical American students; that the vast majority of the students solicited by the defendants displayed greater resistance to temptation than Adam and Dr. Faustus.

This court does not equate dissent with disloyalty. Nor does it equate loyalty with dissent. It has no doubt that the objective of the defendants was not a genuine search for the truth in Cuba. Nevertheless, the issues in this case are not to be determined on the basis of the political views of the defendants or their sincerity or lack thereof. Their actions may excite popular prejudice and many American citizens may feel that the defendants come within the class which President Lincoln described as those who "stand on the Constitution, whilst they [would] stab it in another place."[11] "[B]ut if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." Dissent of Mr. Justice Holmes in *United States* v. *Schwimmer*, 279 U.S. 644, 654–55, 49 S. Ct. 448, 451 (1929).

[11] Letter to John W. Crisfield, June 26, 1862, Francis D. Tandy Co., Lincoln's Complete Works, Vol. VII, 237 (1905); Shaw, The Lincoln Encyclopedia 63 (1950).

The court finds beyond a reasonable doubt that the defendants Laub, Martinot and Schlosser wilfully and knowingly agreed among themselves and with Salvatore Cucchiari and Ellen Irene Shallit to induce, recruit and arrange for a group of American citizens, including the defendants Laub and Martinot, to depart from the United States for the Republic of Cuba; that the defendants Laub, Martinot and Schlosser performed the acts in furtherance thereof hereinabove recited; that the defendants Laub and Martinot wilfully and knowingly departed from the United States for the Republic of Cuba on June 23 and June 25, 1963, respectively; that the defendants Laub and Martinot wilfully and knowingly entered the United States on August 30, 1963, arriving from the Republic of Cuba via Bermuda and Spain.

The questions are whether the said agreement constituted a conspiracy; whether the acts they performed, hereinabove recited, were performed in furtherance of a criminal conspiracy; whether the defendants Laub and Martinot committed substantive crimes when they departed from and entered the United States.

A Case of First Impression

It has already been noted that the defendant Schlosser bore a passport, issued by the Department on June 11, 1962 (see note 6, *supra*); that the defendant Martinot bore such a passport, dated October 23, 1962 (see note 7, *supra*); that the defendant Laub was the bearer of such a passport dated January 29, 1963 (*supra* page 9). The period of the validity of each of these passports being three years,[18] they had not ex-

[18] See note 9, *supra*.

pired when the defendants departed from and returned to the United States. The passports of the defendants Martinot and Schlosser provided in print:

> "This Passport Is Not Valid For Travel To Or In Communist Controlled Portions Of China, Korea, Viet-Nam, Or To Or In Albania."

In addition, the word "Cuba" was stamped beneath the names of the proscribed countries included in print. Beneath the names of all of these countries, including "Cuba," the passports of Martinot and Schlosser bore the following stamp:

> "A Person Who Travels To Or In The Listed Countries Or Areas May Be Liable For Prosecution Under Section 1185, Title 8, U.S. Code, And Section 1544, Title 18, U.S. Code."

The passport issued to the defendant Laub, on the other hand, contained no reference to Cuba. Why "Cuba" was not listed on his passport as one of the proscribed areas and the significance, if any, of that omission were not explained or commented upon during the trial or in any trial memoranda. Nevertheless, Laub was aware of the regulations and policy of the Secretary when he applied for his passport and when he departed from and returned to the United States.

The substance of section 1185 first appeared in the Act of May 22, 1918, ch. 81, 40 Stat. 559. It was in effect until 1921 when its provisions relating to citizens of the United States were terminated. Act of March 3, 1921, ch. 136, 41 Stat. 1359. In 1941, the Act of May 22, 1918 was revived by an amendment thereto. Act of June 21, 1941, ch. 210, 55 Stat. 252. The 1918 Act applied only while the United States was at war. The 1941 amendment applied not only while the United States was at war but also during the existence of the national emergency declared by

the President on May 27, 1941. Proclamation No. 2487, 3 CFR 234 (1943 Cum. Supp.). These acts prohibited the departure from and entry into the United States by a citizen "unless he bears a valid passport." This prohibition remained in effect until it was supplanted in 1952 by 8 U.S.C. § 1185. During these periods (1918 to 1921 and 1941 to 1952) the departure and entry provisions were in effect by virtue of requisite proclamations and executive orders of the President. Proclamation No. 1473, August 8, 1918, Laws Applicable to Immigration and Nationality 1046 (1953 ed.); Executive Order No. 2932, August 8, 1918, *id.* at 1050; Proclamation No. 2523, November 14, 1941, 6 Fed. Reg. 5821. The regulations to implement Executive Order No. 2932 were contained in that order. Those to implement Proclamation No. 2523 were issued by the Secretary. 22 CFR Part 58 (1941 supp.). These regulations of the Secretary, as modified and renumbered, were incorporated by reference into President Truman's Proclamation No. 3004, January 17, 1953, *infra*.

An attorney adviser with the Department who is "Chief of the Security Branch of the Legal Division" testified that he had not, in the course of his duties, read of any case which was prosecuted under the Act of May 22, 1918, *supra*, or the Act of June 21, 1941, *supra*, between 1918–1921 and 1941–1952, involving one who departed the United States with an unexpired passport issued by the Department and visited a proscribed area, despite the fact that his passport either was not validated for travel to such an area or recited that it was not valid for such travel. On the trial of this action, the Government conceded that, from 1952 (when section 1185 was enacted) to 1965, approximately 600 American citizens violated the Secretary's regulations and the restric-

tions contained in their unexpired passports by travelling to areas proscribed by the Secretary with passports not validated for such travel. Nevertheless, it is conceded that none of those citizens were prosecuted and that this is the first case in which the Government is prosecuting citizens of the United States criminally for a violation of 8 U.S.C. § 1185(b) for having departed the United States with an unexpired passport issued by the Secretary, thereafter entering an area so proscribed and thereafter entering the United States.

There are two reported cases in which citizens, bearing no unexpired passports, have been so prosecuted. In *Worthy* v. *United States*, 328 F. 2d 386 (5th Cir. 1964), the defendant departed from the United States, entered Cuba and returned therefrom. He was prosecuted under 8 U.S.C. § 1185(b) for entering the United States "without bearing a valid passport"; found guilty and sentenced. Since he did not bear a nonexpired passport issued to him by the Department, the question as to what constitutes a "valid passport" was not presented. On appeal, the court held § 1185 unconstitutional insofar as it subjects to a criminal penalty a citizen who "does not have a passport" and returns to the United States: "[I]t is our conclusion that the Government cannot say to its citizen, standing beyond its border, that his reentry into the land of his allegiance is a criminal offense; and this we conclude is a sound principle whether or not the citizen has a passport, and however wrongful may have been his conduct in effecting his departure." 328 F. 2d at 394.[19] In *United States* v. *Travis*, 241 F. Supp. 472 (S.D. Cal. 1964), *aff'd*, — F. 2d — (Docket No. 19628, 9th Cir. Nov. 19, 1965),

[19] The Government did not appeal from the remand to the District Court for the discharge of the appellant.

petition for cert. filed, 34 U.S.L. Week 3268 (U.S. Jan. 28, 1966) (No. 963), the defendant departed from the United States on two occasions with the intention of entering Cuba and did so via Mexico. For these two departures she was prosecuted under 8 U.S.C. § 1185(b) and the regulations thereunder, 22 CFR 53.1 through 53.9. It is not clear from a reading of the trial judge's opinion denying defendant's motion to dismiss the indictment, 241 F. Supp. 468 (S.D. Cal. 1963), from his opinion finding the defendant guilty, 241 F. Supp. 472 (S.D. Cal. 1964) or from the opinion of affirmance, *supra*, whether the defendant had no unexpired passport or had an unexpired passport not validated for travel to Cuba, *i.e.*, a passport similar to that issued by the Department to the defendants Martinot and Schlosser. The trial judge has advised the court, however, that Helen Travis did not have *any* unexpired passport when she made the two departures for Cuba.[20]

Unlike *Zemel* v. *Rusk*, 381 U.S. 1, 85 S. Ct. 1271 (1965), the question for decision in the instant case is not whether the Secretary had the authority to refuse to validate the passports of the defendants Martinot and Schlosser for travel to Cuba. In *Zemel* the Supreme Court held that the Secretary had authority to refuse to "validate appellant's passport for travel to Cuba * * * by the authority granted by Congress in the Passport Act of 1926,"[21] 381 U.S. at 13, 85 S.

[20] Judge Crary's letter to me dated January 4, 1966 [1965]:

"The passport she had three years prior to the dates in question had expired and was therefore invalid as of the pertinent dates. So far as the record shows, she had an expired United States passport when she went to Mexico and from there to Cuba."

[21] "§ 211a. Authority to grant, issue and verify passports

The Secretary of State may grant and issue passports * * * under such rules as the President shall designate

Ct. at 1279. The Court did not reach the question presented in the instant case, *i.e.*, whether the enactment of 8 U.S.C. § 1185 in 1952 attaches criminal penalties to travel to an area for which one's passport is not validated. 381 U.S. at 13, 29, 85 S. Ct. at 1279, 1287, n. 4.

The statute and "the regulations thereunder"

8 U.S.C. § 1185(a) (see note 1, *supra*) is effective

> "When the United States is at war or during the existence of any national emergency proclaimed by the President * * * *and* the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the *departure of persons from and their entry into* the United States, *and* shall make public proclamation thereof. * * *" [Emphasis added.]

The latest presidential proclamation of a national emergency is that by President Truman on December 16, 1950, Proclamation No. 2914, 64 Stat. A454, 3 CFR 99 (1949–1953 Comp.).[22] The continuance of the

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and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

[22] Proclamation 2914. Proclaiming the Existence of a National Emergency.

Whereas recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

Whereas world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and * * *

Whereas the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

Now, therefore, I, Harry S. Truman, President of the United

national emergency, so proclaimed, was recognized by President Eisenhower in 1960 and in 1961[23] and by President Kennedy in 1962.[24] There has been no presidential proclamation terminating the national emergency so declared. The defendants contend that the 1950 Presidential Proclamation related only to the emergency created by the Korean conflict and that the duration of the emergency so proclaimed must be limited to the duration of that conflict; that "[t]his court is not bound by a decade-old declaration of a national emergency which is inapplicable to the present situation and no longer exists." The parties to the instant case offered no evidence as to whether the national emergency so proclaimed still exists. The defendants tried this case on the fundamental proposition that, even if a national emergency still existed during the times stated in the indictment, section 1185(b) does not apply to the facts in this case. The court does have a right to consider whether the national emergency has expired by lapse of time. *Chastelton Corp.* v. *Sinclair*, 264 U.S. 543, 547, 44 S. Ct. 405, 406 (1924); *contra*, *United States*

States of America, do proclaim the existence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace."

President Truman later proclaimed that this national emergency still existed on January 17, 1953, in his Proclamation 3004 of that date. 67 Stat. C31, 3 CFR 180 (1949–1953 Comp.).

[23] Executive Order No. 10861, February 11, 1960, 3 CFR 396 (1959–1963 Comp.) and Executive Order No. 10905, January 14, 1961, 3 CFR 436 (1959–1963 Comp.).

[24] Executive Order No. 11037, July 20, 1962, 3 CFR 621 (1959–1963 Comp.).

v. *Travis*, 241 F. Supp. 468, 471 (S.D. Cal. 1963). For the reasons stated in *MacEwan* v. *Rusk*, 228 F. Supp. 306, 312–13 (E.D. Pa. 1964), *aff'd*, 344 F. 2d 963 (3rd Cir. 1965), the court finds that the national emergency so proclaimed has not expired.[34] This contention of the defendants merits no extended treatment, since the court finds that the acts of the defendants do not constitute a crime under § 1185(b), even during the continuance of a national emergency proclaimed by the President pursuant thereto.

President Truman did not make the finding and the public proclamation thereof required by section 1185 (a) or impose additional restrictions, pursuant to section 1185(b), upon the departure of citizens of the United States from and their entry into the United States until his Proclamation No. 3004 of January 17, 1953, 67 Stat. C31, 3 CFR 180 (1949–1953 Comp.).[35]

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[34] In *Zemel* v. *Rusk*, 228 F. Supp. 65, 72 (D. Conn. 1964), the court said that the national emergency proclaimed by President Truman in 1950 still continued. The Supreme Court did not question the existence of the national emergency so proclaimed, when it heard and decided *Zemel*.

[35] After citing section 215 of the Immigration and Nationality Act as his authority to impose restrictions, his 1950 proclamation of a national emergency and the need of additional restrictions "upon the departure of persons from and their entry into the United States" and that "the interests of the United States" require additional restrictions, the President prescribed rules, regulations and orders with respect thereto:

"I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made

The regulations of the Secretary, incorporated into this presidential proclamation by reference, had been prescribed by the Secretary pursuant to the Act of May 22, 1918, as amended, *supra*, and were published as 22 CFR 53.1–53.9 (1949 ed.). Only sections 53.1

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a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * * * *

[A]nd the provisions of this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, shall be in addition to, and shall not be held to revoke, supersede, modify, amend, or suspend, any other proclamation, rule, regulation, or order heretofore issued relating to the departure of persons from, or their entry into, the United States; and compliance with the provisions of this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, shall not be considered as exempting any individual from the duty of complying with the provisions of any other statute, law, proclamation, rule, regulation, or order heretofore enacted or issued and still in effect.

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation." 3 CFR 180–81 (1949–1953 Comp.).

and 53.2 thereof (renumbered 53.2 and 53.3, respectively, in the 1958 revision of 22 CFR) are pertinent."

Section 1185(b) contains a general prohibition against the departure of a citizen from or entry into the United States unless he bears a valid passport. If it contained no limitation or exception, section 1185(b) would require "a valid passport" for every departure from the United States. But Congress authorized the President to make or to authorize the making of limitations upon and exceptions to this broad general prohibition. President Truman prescribed limitations upon and exceptions to the broad prohibition of section 1185(b) when, in his Proclamation No. 3004, January 17, 1953, he incorporated therein the regulations previously prescribed by the Secretary. The Secretary's regulations, like section 1185(b), contained and still contain the broad general limitation upon departure from and entry into the

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[1] "§ 53.2 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States *shall depart from or enter* into or attempt to depart from or enter into any part of the United States as defined in § 53.1, *unless he bears a valid passport which has been issued by or under authority of the Secretary of State* or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 *Exceptions to regulations in § 53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

* * * * *

(b) When traveling between the United States and any country or territory in North, Central, or South America *or in any island adjacent thereto: Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto:" 22 CFR (1958 rev.). [Emphasis added.]

United States without a valid passport. 22 CFR 53.2 (1958 rev.). Section 53.3 thereof goes on to place limitations upon and exceptions to the broad general provision of section 53.2. It enumerates the circumstances under which "no valid passport" is required. But it states the exceptions in terms of "traveling between the continental United States" and certain specified places. When these regulations were incorporated into President Truman's Proclamation of 1953, one could depart and travel between the United States and a number of places including "any country or territory in North, Central or South America or in any island adjacent thereto," without a valid passport. Under these regulations, at that time, one could, for example, depart for Canada, Mexico or Cuba (an island adjacent to North and Central America) without a passport. For travel between the United States and countries and territories other than those excepted by the regulations, a valid passport was required.

On January 16, 1961, the Secretary of State, by Loy W. Henderson, Deputy Under Secretary for Administration, amended 22 CFR 53.3(b) [28] by Departmental Regulation No. 108.456, 26 Fed. Reg. 482–83, so as to bring Cuba within the general provisions of section 53.2 (and, thereby, within the general provision of § 1185(b)). He stated therein that the amendment was made "Pursuant to the authority vested in me by paragraph 126 of Executve Order

[28] "§ 53.3 *Exceptions to regulations in § 53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

* * * * *

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: * * *" 26 Fed. Reg. 482–83, 22 CFR 53.3. (1965 ed.).

No. 7856, dated March 31, 1938," 3 Fed. Reg. 681–687,[29] and that said Executive Order had been issued pursuant to 22 U.S.C. § 211a [30] and 5 U.S.C. § 151c.[31] After reciting this authority, and out of context, there is inserted in the middle of this amendment (in parentheses) a citation of 8 U.S.C. § 1185 and Proclamation No. 3004. The parenthetical insertion does not state that the Secretary claims these cited provisions as authority for the amendment. One must assume, however, that, by this unexplained parenthetical insertion, the Secretary purported to amend his regulations not only pursuant to the authorities first cited in the introductory paragraph but also under the authority of § 1185 and Proclamation No. 3004.

As so amended, Cuba was now placed in the same class with the countries of Europe with which we maintained diplomatic relations. Under the general provision of § 1185(b) and section 53.2 of the Secretary's regulations one was required to bear a valid passport if he departed for Europe or, for that matter, for any other country not excepted from the general provision. Under the general provision of section 1185(b) and of section 53.2 of the regulations one

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[29] "126. The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to these rules and not inconsistent therewith."

[30] See note 21, *supra*.

[31] "§ 151c. Rules and regulations; promulgation by Secretary; delegation of authority

The Secretary of State may promulgate such rules and regulations as may be necessary to carry out the functions now or hereafter vested in the Secretary of State or the Department of State, and he may delegate authority to perform any of such functions, including if he shall so specify the authority successively to redelegate any of such functions, to officers and employees under his direction and supervision."

was required to have a valid passport merely because he was departing from the United States, except as limitations upon and exceptions to this requirement were authorized and prescribed by the President. If section 1185(b) empowered the President to place limitations upon *travel to* a particular country or territory one would expect that the Secretary would have incorporated prohibitions upon "travel to a country or territory" in his regulations. When section 53.3(b) of his regulations was amended, as aforesaid, however, the Secretary did not include in that amendment a provision invalidating outstanding passports for travel to or in Cuba or requiring that passports issued thereafter would not be valid for travel to or in Cuba unless specifically endorsed for such travel. Rather, on the same day when the Secretary so amended section 53.3 of his regulations, he made an announcement, in the form of a press release entitled "Restrictions on Travel to or in Cuba," thereafter published as Public Notice 179, 26 Fed. Reg. 492.[32] The authority he cited

[32] "Department of State (Public Notice 179) United States Citizens.

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba ex-

therein for this public notice is 22 U.S.C. § 211a and Executive Order No. 7856 of President Roosevelt issued back in 1938. Neither section 1185 nor its predecessor was in effect in 1938. President Roosevelt had issued this Executive Order under the authority of 22 U.S.C. § 211a. It is to be noted that this announcement by the Secretary is not published in the Code of Federal Regulations, but merely in the Federal Register where it appears under the section "Public Notices," not under Part 53 of Title 22 entitled "Travel Control of Citizens and Nationals in Time of War or National Emergency." On the other hand, the Secretary's amendment to 22 CFR § 53.3(b), *supra*, requiring a passport for travel between the United States and Cuba, is published under said Part 53. This suggests an awareness of the difference between departure regulations, promulgated under § 1185, and "travel to" regulations, promulgated under section 211a. For regulations, purporting to be promulgated under section 1185 are uniformly published in Part 53 of 22 CFR; those promulgated pursuant to section 211a are usually published in Part 51 ("Foreign Relations, Part 51—Passports") thereof, if they are published under any specified part.

The indictment charges the defendants with conspiracy to violate section 1185(b) "and the regulations

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cept the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba, their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this Order is revoked.

Dated: January 16, 1961

For the Secretary of State

LOY HENDERSON,

Deputy Under Secretary for Administration."

issued thereunder" and with having departed from and entered the United States in violation of section 1185(b). The public notice of the Secretary, not § 1185(b) or "the regulations issued thereunder," purports to render United States passports not valid for travel to or in Cuba unless specifically endorsed for such travel.

What is a Passport?

The word "passport" derives from the early modern French "passeport" ("passe," he passes plus "port" or harbour).[7] The Act of May 22, 1918, *supra*, did not define "passport."[8] The President, however, defined it in his Executive Order No. 2932, *supra*, entitled "Rules and Regulations Governing the Issuance of Permits to Enter and Leave the United States," as follows:

> "Sec. 5. The term 'passport' as used herein includes any document in the nature of a passport issued by the United States or by a foreign

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[7] Partridge, Origins, A Short Etymological Dictionary of Modern English 461 (2d ed. 1959); Hunt, The American Passport (Department of State, 1898).

[8] "CHAP. 81. An Act To prevent in time of war departure from or entry into the United States contrary to the public safety.

* * * [W]hen the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful— * * *

Sec. 2. * * * except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, * * * for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport."

government, which shows the identity and nationality of the individual for whose use it was issued and bears his signed and certified photograph."

This definition accords with that of Green Hackworth,[35] while Legal Advisor to the Department of State. He gave the traditional definition in 1942—before the Supreme Court recognized exit control as the "crucial function" of a passport in *Kent* v. *Dulles, infra.*

The Supreme Court has defined "passport" in two noteworthy opinions. In *Urtetiqui* v. *D'Arcy,* 9 Pet. (34 U.S.) 692, 699 (1835), the Court, holding a passport inadmissible as proof of citizenship, said:

> "It is a document which, from its nature and object, is addressed to foreign powers; purporting only to be a request that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized in foreign countries as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact."

In *Kent* v. *Dulles,* 357 U.S. 116, 121, 129, 78 S. Ct. 1113, 1115, 1120 (1958), the Court quoted this statement from *Urtetiqui* as to the function of a passport and continued:

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[35] "The American passport is a document of identity and nationality issued to persons owing allegiance to the United States and intending to travel or sojourn in foreign countries. It indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and requests on the part of the Government of the United States that the officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection. It has no other purpose." 3 Hackworth, Digest of International Law 435 (1942).

> "[T]hat function of the passport is subordinate. Its crucial function today is control over exit."

In *Worthy, supra,* 328 F. 2d at 391, the Court of Appeals for the Fifth Circuit gave a definition which, in effect, combined those in *Urtetiqui* and *Kent* and added a "travel to" component:

> "A passport is evidence of the permission of the sovereign to its citizen *authorizing him to travel to foreign countries* and to return to the land of his allegiance, as well as a request to foreign powers that the person to whom it has been issued may be allowed to pass freely and safely." [Emphasis added.]

The definition in *Urtetiqui,* as expanded in *Kent,* is supported by the history of passports and documents in the nature of passports,[36] as well as by the opinions of the deans of many law schools and several professors of law.[37] The court in *Worthy, supra,* cites no authority for its "travel to" aspect of a passport. This court cannot accept the *Worthy* definition as applicable to the instant criminal prosecution for having *departed from* the United States without a valid passport.

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[36] See Hunt, *op cit, supra,* note 33 at 1–6; Riesman, *Legislative Restrictions on Foreign Enlistment and Travel,* 40 Colum. L. Rev. 793, 815–22 (1940); testimony of R. W. Scott McLeod, Administrator, Bureau of Security and Consular Affairs, Department of State, Hearings Before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, 84th Cong., 2d Sess., on H. R. 9991, ser. 24, at 4–10 (1956); Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, Freedom To Travel 18-22 (1958).

[37] See The Right to Travel and United States Passport Policies (a staff study prepared for the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate), Senate Doc. No. 126, 85th Cong., 2d Sess. (1958).

No statutory definition of "passport" (prior to the enactment of the Immigration and Nationality Act of 1952, 66 Stat. 163, 166, 8 U.S.C. §§ 1101 *et seq.*), has been found. Section 101(a)(30) of that Act (8 U.S.C. § 1101(a)(30)) defines "passport" as follows:

> "(30) The term 'passport' means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the entry of the bearer into a foreign country." [Emphasis added.]

Prior to this Act of 1952, the predecessor of section 1185 was included in Title 22 of the United States Code, entitled "Foreign Relations and Intercourse." This section of the Code was repealed when its substance was incorporated into the Immigration and Nationality Act of 1952 as section 215 (8 U.S.C. § 1185). This Act relates primarily to immigrant aliens. This statutory definition, in terms of "entry * * * into a foreign country," stated in an omnibus Immigration and Nationality Act, casts little light upon the meaning of a criminally punitive provision (albeit incorporated into and engrafted upon that Act) for departure from the United States without a valid passport.

What is a Valid Passport?

Prior to 1856, various federal, state and local officials and notaries public had undertaken to issue either certificates of citizenship or other documents in the nature of letters of introduction to foreign officials, requesting treatment by them of the bearer according to the usages of international law. Congress put an end to such practices by the Act of August 18, 1856, 11 Stat. 52, 60-61, 22 U.S.C. § 211a. *Kent* v. *Dulles*, *supra*, 357 U.S. at 123, 78 S. Ct. at 1117. After this enactment only passports issued by the Secretary were

"valid passports." The statutory definition of "passport" in 8 U.S.C. § 1101(a)(30), *supra*, when read in conjunction with § 211a, makes it clear that the Secretary is the only "competent authority" who may issue a valid passport. 8 U.S.C. § 1101(a)(30) defines "passport" in terms of entry of its bearer into a "foreign country." The passports issued to the defendants were valid "for the entry of the bearer into *a* foreign country" (emphasis added), though, as contended by the Government, they may not have been valid for entry into a *particular* foreign country, namely Cuba. Were there an act of Congress making it a crime for a citizen to *enter* Cuba without a valid passport and had the defendants been indicted for a violation thereof, this definition in 8 U.S.C. § 1101(a)(30) would be applicable, subject only to its surviving judicial scrutiny upon constitutional grounds.

The Form of Passports Issued by the Secretary

The first page of a passport issued by the Secretary indicates what a passport is:

> "The Secretary of State of The United States of America
>
> hereby requests all whom it may concern to permit the citizen(s) of the United States named herein to pass without delay or hindrance and in case of need to give said citizen(s) all lawful aid and protection."

On the inside of the front cover appears a printed notice to the effect that it is not valid until signed by the person to whom it is issued:

> "IMPORTANT
>
> This passport is NOT VALID until signed BY THE BEARER on page two."

On the inside of the back cover it contains a printed warning as to the consequences of its use in violation of the conditions or restrictions contained therein:

> "VIOLATION OF CONDITIONS OR RESTRICTIONS
>
> If you use or attempt to use this passport in violation of the conditions or restrictions contained in it, you may lose the protection of the United States while you continue to reside abroad, and you may be liable for prosecution (Section 1544, Title 18, U.S. Code)."

Only following the January 1961 amendment of the Secretary's regulations and his press release, *supra*, did passports include a stamped notice (as did those of the defendants Martinot and Schlosser) that one who *travels to or in* a proscribed area "*may be* liable for prosecution" not only under Section 1544, Title 18, U.S. Code [38] but also under "Section 1185, Title 8, U.S. Code."

It would appear that, during all of the time that section 1185 and its predecessor were in effect (prior to January 16, 1961), the Secretary's administrative interpretation of applicable law was that 18 U.S.C. § 1544 was the only criminal sanction enacted by Congress for the use of a passport "in violation of the

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[38] "§ 1544. Misuse of passport.

Whoever willfully and knowingly uses, or attempts to use, any passport issued or designed for the use of another; or

Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports; or

Whoever willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed—

Shall be fined not more than $2,000 or imprisoned not more than five years or both."

conditions or restrictions therein contained" and did not consider section 1185 or its predecessor applicable.

One can understand the refusal of the Secretary to issue a passport to or validate a passport of one who intends to use it upon entry into a country with which the United States does not maintain diplomatic relations. Since we are not on speaking terms with such a country, the Secretary does not desire to make any requests of "all whom it may concern" in that country. It does not follow that a passport "not valid" for purposes of the Secretary's request to "all whom it may concern" is not valid for purposes of departure from and entry into the United States.

Departure Procedure

Before one boards an airplane at Kennedy Airport on a flight to Europe, for example, he must exhibit an unexpired passport issued to him by the Secretary. No employee of any United States government agency examines such passports. Rather, they are exhibited to and examined by employees of the airline at its departure counter. 8 U.S.C. § 1221 (b) mandates the commanding officer of an aircraft taking on passengers at any port of the United States, who are destined to any place outside the United States, to file with the immigration officer "before departure" a list of all such persons in such form and containing such information "as the Attorney General shall prescribe by regulation as necessary for the identification of the persons so transported and for the enforcement of the immigration laws." (It is to be recalled that section 1185 is a section of the "immigration laws.") Until this requirement is complied with, no commanding officer of such an aircraft "shall be granted clearance papers for his * * * aircraft." As to aircraft which are determined to be making

regular trips to the United States, "the Attorney General may, when expedient, arrange for the delivery of lists of outgoing persons at a later date."

The Attorney General's regulations prescribe that a manifest be executed on Form I–94. As to American citizens departing from the United States, only the name, nationality, United States address and passport number of the passenger, in addition to identification of the flight, are required. Presentation of this manifest to the immigration officer at the port of departure may be deferred "for a period not in excess of 30 days." 8 CFR § 231.2 (1965 rev.). The record indicates that the manifests of those aboard the several aircraft on which the defendants and the other members of the group departed from the United States were not so presented by the respective airlines until the day after their respective departures. In effect, the Attorney General has delegated to the commercial airlines the duty of preventing departure from the United States without a valid passport. Form I–94 suggests that a passport is valid for departure if issued by the Secretary and not yet expired. There is nothing in the Attorney General's said regulations which equates departure from the United States with entry into an area proscribed by the Secretary. All that his regulations require of a citizen who is to depart from the United States is that he be the bearer of an unexpired passport issued by the Secretary.

If section 1185(b) means what the Government now contends, this practice as to the departure of citizens from the United States falls woefully short of "the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act [§ 1185] and this proclamation" enjoined "upon all officers of the United States charged with the execution of the laws thereof" by President Truman in Proclamation

3004 of January 17, 1953." If, on the other hand, section 1185(b) is what it purports to be, *i.e.*, a departure and entry statute, this departure procedure comports with "the immigration laws," and the provision of § 1185(c) thereof, subjecting the aircraft to forfeiture, is not as Draconian as it might otherwise be.

When is the Crime Committed?

If section 1185(b) is more than a departure statute; if the ultimate destination of a passenger, rather than his departure from the United States, comes within this criminal statute, when is the crime committed? The Government contends that it is committed the moment a citizen departs from the United States with the intention of ultimately going to a proscribed area. If, for example, a citizen so departed with the intention of entering Cuba but changed his mind after he arrived in London or Paris and did not continue on to Cuba, he would nevertheless have violated this criminal statute, according to the Government. He would have committed what the Government characterizes as "a technical violation." The Government refused to take a position in the suppositious case of a citizen who departs from the United States with no intention of continuing on to Cuba but, after arrival in London or Paris, changes his mind and does so proceed.

Doubts as to the Applicability of section 1185(b) as a "travel to" statute

The Special Committee of the Association of the Bar of the City of New York To Study Passport Procedures, composed of distinguished partners of some of the outstanding law firms in New York City

[49] See note 26, *supra*.

and Adrian S. Fisher, now chief reporter of the America Law Institute's Restatement of the Foreign Relations Law of the United States, published its report in 1958. After considering all of the federal statutes (including section 1185) prescribing penalties for violations of travel restraints, it came to the following conclusion:

> "The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case."[40]

The Department of State issued a press release on May 1, 1952, announcing that it was taking additional steps "to warn American citizens of the risks of travel in Iron Curtain countries by stamping all passports not valid for travel in those countries unless specifically endorsed by the Department of State for such travel." Nevertheless, in that press release "the Department emphasized that this procedure in no way forbids American travel to those areas."[41] This press release implies a recognition by the Secretary that his regulations, as reflected in passports stating that they are not valid for travel to or in a particular area, may, as a practical matter, constitute an obstacle but not a barrier to such travel. As I read the opinion of the Supreme Court in *Zemel, supra*, it held merely that, when Congress enacted 22 U.S.C. § 211a, it authorized the Secretary to impose

[40] Freedom To Travel 70 (1958).

[41] Hearings Before Senate Foreign Relations Committee on Department of State Passport Policies, 85th Cong., 1st Sess., at 3 (1957).

area restrictions and to refuse to validate a United States passport for travel to any such area. The Supreme Court did not pass upon the question of whether the exercise of this power, which it read into section 211a, constitutes not only an obstacle but also a barrier, i.e., whether the Secretary has the further power to forbid travel by a United States citizen to such an area and, thereby, to make such travel a crime within the scope of 8 U.S.C. § 1185(b). "But whether or not the new legislation was intended to attach criminal penalties to the violation of area restrictions, it certainly was not meant to cut back upon the power to impose such restrictions." *Zemel, supra*, 381 U.S. at 12, 85 S. Ct. at 1278.

In May 1956, R. W. Scott McLeod, Administrator of the Bureau of Security and Consular Affairs of the Department of State, testified before Subcommittee No. 1 of the House Committee on the Judiciary with reference to the Immigration and Nationality Act of 1952, *supra*. By this time a number of cases concerning passport denials were either pending or had been decided at the district court and circuit court levels.[12] Mr. McLeod, in discussing the Act, including section 1185, said in substance that, in his opinion, a United States citizen may leave the United States without any passport for any part of the Western Hemisphere (including Cuba, since the Secretary's amendment to

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[12] *Dulles* v. *Nathan*, 129 F. Supp. 951 (D.D.C. 1955). See also 225 F. 2d 29 (D.C. Cir. 1955); *Shachtman* v. *Dulles*, 225 F. 2d 938 (D.C. Cir. 1955); *Robeson* v. *Dulles*, 98 U.S. App. D.C. 313, 235, F. 2d 810 (D.C. Cir.), *cert. denied*, 352 U.S. 895, 77 S. Ct. 131 (1956); *Boudin* v. *Dulles*, 136 F. Supp. 218 (D.D.C. 1955), *modified* 235 F. 2d 582 (D.C. Cir. 1956); *Kent* v. *Dulles*, pending in the D.C. Circuit Court of Appeals 1956, see 248 F. 2d 600 (1957); *Briehl* v. *Dulles*, pending in the D.C. Circuit Court of Appeals in 1956, see 248 F. 2d 561 (D.C. Cir. 1957).

22 CFR 53.3(b) was not made until 1961); that having so departed, the citizen may travel elsewhere subject only to the laws of the country of his destination:

> "As has been noted, you may leave the United States for any part of the Western Hemisphere without a passport. True, if it is your intention to transit other parts of the Western Hemisphere and to go outside of it, under our law you are required to have a passport; but for those who would circumvent the law, certainly the opportunity exists to travel without a passport. And once they have left the United States, any inhibitions on travel abroad are not as a result of our laws, but the laws of other countries."[a]

This view was not shared by the court in *United States* v. *Travis, supra.* Nevertheless, it does reflect administrative interpretation of the scope of section 1185(b) by the Department of State.

On June 16, 1958, the Supreme Court handed down its opinion in *Kent* v. *Dulles, supra.* The decision in Kent turned upon the question as to whether § 1185 and § 211a delegated to the Secretary authority to deny passports to the plaintiffs upon the ground that they were Communists. The Court approached the problem from the standpoint of the fundamental "exercise by an American citizen of an activity [the right to travel] included in constitutional protection," stating that it:

> "[would] not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. * * * And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. *If that 'liberty' is to be regulated, it must be pursuant to the lawmaking*

[a] Hearings, 84th Cong., 2d Sess., on H.R. 9991, ser. 24, at 4 (1956).

functions of the Congress. * * * And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. * * * Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. * * * They may or may not be Communists. But assuming they are, the only law which Congress has passed expressly curtailing the movement of Communists across our borders has not yet become effective. It would therefore be strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations. * * * We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement." 357 U.S. at 129–130, 78 S. Ct. at 1120. [Emphasis added.]

"We need not decide the extent to which it can be curtailed." 357 U.S. at 127, 78 S. Ct. at 1119."

On July 7, 1958, less than one month after this decision, President Eisenhower sought to enlist "the lawmaking functions of the Congress" in a special message seeking legislation which would grant to the Secretary "clear statutory authority to prevent Amer-

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"The Court was referring to section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. § 785, which was later held unconstitutional in *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S. Ct. 1659 (1964).

icans from *using passports for travel to areas* where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United States." H.R. Doc. No. 417, 104 Cong. Rec. 11849, 1958 U.S. Code, Cong. and Admin. News, 85th Cong. 2d Sess. 5465 [Emphasis added.] The Secretary drafted a proposed bill to carry out the President's recommendations, which was introduced as H.R. 13318 by Congressman Keating of New York. It proposed to consolidate all federal law relating to passports into the "Passport Act of 1958." Section 402 thereof would have prohibited *"travel to or in any country or area* which to his [the holder of a United States passport] knowledge has been designated by the Secretary of State" as an area inappropriate for travel by United States citizens. [Emphasis added.] One who violated this provision would be guilty of a misdemeanor. This, obviously, was to be a "travel to" statute, supplementary to section 1185, a departure statute. Understandably, therefore, section 602 of this bill provided:

> "602. Nothing in this Act should be construed to limit, amend or repeal the provisions of section 215 of the Act of June 27, 1952, chapter 477, title II, chapter 2, (8 U.S.C. sec. 1185)."

The House Committee on Foreign Affairs considered this bill. It did not report it out because it felt that the Secretary's bill was too broad.[15] This statutory authority sought by the Secretary but not granted by the Congress is the very power claimed by the Government in the instant case.

22 U.S.C. § 211a is a passport statute. 8 U.S.C. § 1185 is, by its terms, a departure statute. This distinction must be recognized. It has been recog-

[15] See H.R. Rept. No. 2684, 85th Cong., 2d Sess. 4 (1958).

nized by the Department. It submitted written replies to questions put to one of its representatives, who appeared before the House Committee on Foreign Affairs in 1958 when it was considering a bill (S. 2770), introduced by Senator Fulbright of Arkansas:

> "The Department believes that passports should be denied, even in peacetime and in the absence of a national emergency, to law violators and to Communist supporters, whether or not passports are required for departure from the United States. *The problem here lies in the distinction between passport issuance and the control of travel, two concepts which are intermingled throughout the Fulbright bill but which are separate under existing law and which in our belief should remain separate.*" [46] [Emphasis added.]

Several other bills were introduced which sought to empower the President to restrain the travel of United States citizens and to limit the validity of passports with respect to travel to certain countries or areas declared by the President to be "off limits" and to prohibit travel to any such country or area. H.R. 9069, 86th Cong., 1st Sess. (1959) sought to restrain travel by an amendment to § 211a. The favorable report of the Committee on Foreign Affairs considered this bill as one which would add specific statutory authority for the President to restrain travel.[47] It was not enacted into law. Another bill,

[46] Hearings Before House Committee on Foreign Affairs, 85th Cong., 2d Sess. 28 (1958).

[47] "*Geographical limitations.* The bill adds to existing law specific authorization for the President to restrain the travel of all citizens and limit the validity of all passports for designated areas." H.R. Rept. No. 1151, 86th Cong., 1st Sess. 4 (1959).

H.R. 388, 87th Cong., 1st Sess. (1961), proposed to amend section 1185(b) so as to add a provision making it "unlawful for any citizen of the United States to * * * (2) travel to any country in which his passport is declared to be invalid." * * *" It was not enacted into law. H.R. 9045, 88th Cong., 1st Sess. (1963) would have amended section 1185(b) by adding to the departure and entry provisions thereof, as further crimes by United States citizens:

> "(2) *travel to, enter or travel in* or through any country or area, unless he bears a passport specifically endorsed for and authorizing such travel or entry therein; or
>
> (3) *travel to, enter, or travel in* or through any country or area to which travel by United States citizens has been prohibited by the President." [Emphasis added.]

This bill was not enacted into law. H.R. 11621, 88th Cong., 2d Sess. (1964) would have added a new section to 8 U.S.C., immediately following section 1185. Thus the departure and entry statute, section 1185, would have remained in effect. A new section would have related to entry into a proscribed area, for a violation of which the penalty would be a fine of up to $10,000 or imprisonment of up to two years, or both. This bill was not enacted into law, nor was an identical bill, H.R. 11603, 89th Cong., 1st Sess. (1964).

S. 806, 86th Cong., 1st Sess. (1959), introduced by Senator Humphrey "(for himself, Mr. Anderson, Mr. Chavez, Mr. Hennings, Mr. Morse, Mr. Neuberger and Mr. Symington)" reflected a more liberal attitude toward the right of United States citizens to travel. It would have repealed § 1185(b) and other statutes inconsistent with the Humphrey bill; would have sub-

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[15] The present prohibition against departure from and entry into the United States without a valid passport was to remain in § 1185(b).

jected the right to travel only "to the war power granted to the President and the Congress"; would have authorized the Secretary to refuse or limit the issuance of passports only (1) following a declaration of war by the Congress, (2) following the outbreak of hostilities in which the Armed Forces of the United States participate or (3) upon the application of a person under indictment, information or sentence for the commission of a felony. As to area restrictions under other circumstances (such as lack of diplomatic relations), the President would be empowered only to determine that the United States may not be able to give its usual protection to citizens travelling in designated areas. In the event of such a determination, it would devolve upon the Secretary to so inform each passport applicant. Nevertheless "The President shall not forbid travel in these areas by persons under this Act." This bill acknowledges the distinction between the designation of an "off limits" area, on the one hand, and the right of a citizen to enter such an area at his own risk. It was drafted (as it stated) with a realization and proposed finding "that freedom of movement is basic in the scheme of American institutions" and that "the crucial function of a passport is control over entry or exit." This is what the Supreme Court said in *Kent* v. *Dulles*, *supra*. This bill, likewise, was not enacted into law."

Section 1185(b) is a Criminal Statute

The cardinal principle that a "criminal statute is to be construed strictly, not loosely," *United States* v. *Boston & Maine R.R.*, 380 U.S. 157, 160, 85 S. Ct. 868,

" Many other bills have been introduced in the Congress relating to area restrictions, passport control in general, members and supporters of the International Communist movement—none of which has been enacted into law.

870 (1965), "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *United States* v. *Wiltberger,* 5 Wheat. (18 U.S.) 76, 95 (1820). It requires no further citation to support the equally cardinal principle that the power of punishment is not vested in the executive department. If, arguendo, the use of the phrase "valid passport" in section 1185(b) creates an ambiguity, the court is bound to resolve any ambiguity in favor of the defendants. *Bell* v. *United States,* 349 U.S. 81, 83, 75 S. Ct. 620, 622 (1955). There is a greater compulsion to construe strictly a criminal statute affecting the right of exit which the Supreme Court has classified as "a personal right included within the word 'liberty' as used in the Fifth Amendment." *Kent* v. *Dulles, supra.* The Government seeks to read into an exit and entry statute the pronouncement of the Secretary in his press release of January 16, 1961, *supra.*

Legislative History Does Not Support the Government's Contention

Nothing in the history of the Act of May 22, 1918, *supra,* the Act of June 21, 1941, *supra,* or 8 U.S.C. § 1185 suggests that they or any of them were anything more than border control statutes regulating departure from and entry into the United States.

The enactment of § 1185 in 1952 has no independent legislative history.[50] However, since § 1185(b) is

[50] Only one statement about this section appears in the House Report.

"The powers of the President to provide additional prohibitions and restrictions on the entry and departure of persons during time of war or the existence of a national emergency are incorporated in the bill (sec. 215) in practically the same form

cast in language almost identical to that of the Acts of May 22, 1918 and June 21, 1941, one may ascertain the intent of the Congress by examining the history of those earlier acts.[51]

The Committee Reports[52] and Congressional Debates[53] as to both the Act of May 22, 1918 and its amendment by the Act of June 21, 1941, clearly indicate that the Congress and the President,[54] in those years respectively, were concerned with the uncontrolled departure and entry of citizens of the United States, who, it was believed, were acting in furtherance of the war efforts of foreign powers and to the detriment of the interests of the United States. A system of border control was necessary.[55] The manner settled upon to control ingress and egress was to require all American citizens to bear passports upon departure from and entry into the United States. So, in 1918 and then again in 1941, Congress enacted statutes which made unlawful the departure and entry of American citizens without passports. Since, for example, the Secretary of State would not issue a passport to a citizen of the United States who, in 1918, was acting in furtherance of Germany's war ef-

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as they now appear in the act of May 22, 1918 (40 Stat. 559.)" H.R. Rept. No. 1365, 82d Cong., 2d Sess. 53 (1952).

[51] See *Kent* v. *Dulles*, 357 U.S. 116, 137, 78 S. Ct. 1113, 1124 (1958) dissenting opinion); *United States* v. *Plesha*, 352 U.S. 202, 205, 77 S. Ct. 275, 277 (1957).

[52] H.R. Rept. No. 485, 65th Cong., 2d Sess. (1918); S. Rept. No. 444, 77th Cong., 1st Sess. (1941).

[53] See 56 Cong. Rec. 5969–70, 6029–31, 6062, 6064–68, 6192–93, 6195, 6246–47 (1918); 87 Cong. Rec. 4806, 5047–49, 5052 (1941).

[54] H.R. Rept. No. 485, 65th Cong., 2d Sess. 2 (1918). See also Annual Report of the Attorney General of the United States for the Year 1917, 16 (1917).

[55] See *e.g.*, H.R. Rept. No. 485, 65th Cong., 2d Sess. 2, 3 (1918); S. Rept. No. 444, 77th Cong., 1st Sess. (1941); 87 Cong. Rec. 5047–49 (1941).

forts, an entry or departure by such citizens without a passport would violate the predecessor of § 1185(b).

Congress recognized that this absolute restriction might work hardships, unnecessarily, on loyal Americans.[56] Therefore, in enacting these statutes, Congress authorized the President to promulgate exceptions to and limitations upon this absolute restriction. The President was authorized to and did except certain categories of persons from the operation of this restriction. Military and naval personnel, as well as other classes of government personnel, were permitted to depart and enter without bearing valid passports.[57] Americans travelling between the United States and Canada, likewise, were not required to be the bearers of valid passports upon departure and entry (this exception was eventually expanded to include the entire Western Hemisphere).[58] When Congress enacted § 1185 in 1952, *these* were the powers of the President as they existed under the Act of May 22, 1918, as amended by the Act of June 21, 1941.[59]

There is nothing in the history of these Acts from which one may reasonably infer that Congress intended to grant the executive branch of the Government the power to subject to criminal penalties a United States citizen who departs from or enters the United States bearing an unexpired passport issued by the Secretary, even though he travels to an area proscribed by the Secretary.

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[56] 56 Cong. Rec. 6029–31, 6062, 6065, 6193, 6246–47 (1918).

[57] See *e.g.*, Exec. Order No. 2932, August 8, 1918, Laws Applicable to Immigration and Nationality 1050 (1953 ed.).

[58] *Ibid.* See also Exec. Order No. 3326, Sept. 17, 1920, *id.* at 1065; 22 CFR 58.3 (1941 Supp.); 22 CFR 53.3 (b) (1958 rev.).

[59] See note 50, *supra*.

The Secretary, at least since 1914, has exercised the power to declare passports invalid for use in or travel to specified countries and areas (*i.e.*, to impose area restrictions) and to refuse to validate passports for travel to said countries or areas.[60] This authority stems from 22 U.S.C. § 211a.[61] It clearly does not stem from § 1185 or its predecessor since the Secretary has exercised the power whether or not these statutes were in effect.[62] Furthermore, even while § 1185 has been in effect, the Secretary has not cited it as authority for such restrictions upon the use of passports. On the contrary, when he cited any authority, it was § 211a.[63] The imposition of such re-

[60] See Dep't of State, Circulars Relating to Citizenship—1915, 48 (1915).

[61] *Zemel* v. *Rusk*, *supra*. See also Exec. Order No. 7856, 3 Fed. Reg. 681 (1938). Prior to the Supreme Court decision in *Zemel* v. *Rusk*, a number of lower courts had concluded that the power to impose area restrictions on passports, and to refuse to validate passports for travel to restricted areas, was granted by § 1185. See *e.g.*, *Worthy* v. *Herter*, 270 F. 2d 905, 912 (D.C. Cir.), *cert. denied*, 361 U.S. 918, 80 S. Ct. 225 (1959); *MacEwan* v. *Rusk*, 228 F. Supp. 306, 310–12 (E.D. Pa. 1964), *aff'd*, 344 F. 2d 963 (3d Cir. 1965). The District Court in *MacEwan* went further, concluding that travel to Cuba without a specially validated passport would violate § 1185. 228 F. Supp. at 315 (civil suit). See also *United States* v. *Healy*, 376 U.S. 75, 84 S. Ct. 553 (1964) (dictum). The Supreme Court, however, in *Zemel*, purposefully refused to reach either of these conclusions, specifically holding that "area restrictions" were authorized by § 211a.

[62] See note 60, *supra*. See also 3 Hackworth, Digest of International Law 531–33 (Spain and China); 4 Fed. Reg. 176 (Europe).

[63] See *e.g.*, Public Notice 179, 26 Fed. Reg. 492 (1961) (Cuba).

"That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen, who recently re-

strictions was not limited to instances of war or a national emergency. These two statutes and the regulations and restrictions under each of them relate to different problems. § 1185(b) and the regulations thereunder are directed against the subversive transference of military information and espionage for foreign enemy governments by citizens of the United States during time of war or national emergency.[84]

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turned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined."

[84] 87 Cong. Rec. 5047–48 (1941):

"Since the outbreak of the present war in Europe the Department of State has from time to time given consideration to the desirability of the modification of the act of May 22, 1918 * * * in such a manner as to permit the President, at a time such as the present, to prescribe rules and regulations governing the entry into and the departure from the United States of all persons, if he deems that the interests of the United States so require * * * [T]here is no provision of law under which citizens of the United States may be required to bear valid passports in order to depart from or enter the United States or under which the departure from the United States of aliens may be controlled. Since the outbreak of the present war it has come to the attention of the Department of State and of other executive departments that there are many persons in and outside of the United States who are directly engaged in espionage and subversive activities in the interests of foreign governments, and others who are engaged in activities inimical to the best interests of the United States who

The regulations under § 211a, *i.e.*, the "travel to" restrictions, are directed toward preventing American citizens from travelling to countries where they may be subject to personal risks (such as countries in which famine or civil war is raging)[85] or travelling to countries in which it will be difficult or impossible for the United States to offer them diplomatic protection,[86] *i.e.*, countries with which the United States does not maintain diplomatic relations.

When the Acts of May 22, 1918 and June 21, 1941, were enacted, "travel to" restrictions were in effect by virtue of regulations issued prior to their effective

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desire to travel from time to time between the United States and foreign countries in connection with their activities, as well as others who desire to leave the United States for the purpose of evading justice.

During the last war, when it is believed a lesser number of persons were engaged in espionage and subversive activities *in the United States* than is now the case, notwithstanding the fact that the United States is not at war, it was found desirable to enact legislation to provide for the regulation of travel to and from the United States on the part of all persons, citizens as well as aliens. The situation existing throughout the world and the necessity of promoting as far as possible the national defense justify, it is believed, the enactment of legislation providing for the centralization of control over the entry into and departure from the United States of persons of all classes. It is believed that this could be accomplished by the modification of the first paragraph of the act of May 22, 1918, so that the President could issue rules and regulations governing the entry into and departure from the United States of all persons. * * *" [Emphasis added.]

[85] See *e.g.*, famine in Belgium, 3 Hackworth, *op. cit. supra*, note 62 at 526; civil war in Spain, *id.* at 531–33. See also, Right to Travel 14–18 (1958).

[86] "Generally speaking, the United States will not validate passports for travel to countries with which we do not have diplomatic relations. Americans traveling to such countries cannot be extended the usual protection offered American citi-

dates." That these statutes were not intended to encompass or embrace the "travel to" restrictions of these regulations is clear from the language of the statutes. These statutes were to become effective when "the President shall find * * * that restrictions and prohibitions *in addition to those provided otherwise than by this Act,*" were necessary. Further § 1185 and its predecessor were only to become effective when the President found that additional restrictions and prohibitions should "be imposed upon the *departure of persons from and their entry into the United States,*" not additional restrictions as to countries Americans would be permitted to visit.

If the Congress, by enacting § 1185(b) and its predecessor, intended to prohibit travel to proscribed areas as well as to prohibit departure and entry without passports, one may reasonably wonder why the Congress did not expressly provide for such a prohibition. The principle that when the Congress "has the will it has no difficulty in expressing it," *Bell* v. *United States,* 349 U.S. 81, 83, 75 S. Ct. 620, 622 (1955), is pertinent. For, in 1939, two years prior to the Act of June 21, 1941, Congress, by joint resolution, The Neutrality Act of 1939, 54 Stat. 4, 7, 11, specifically gave the President the authority to pro-

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zens and property abroad by our embassies and consulates abroad. * * *

* * * * *

In addition to not validating passports for countries with which we have no diplomatic relations, the Secretary of State may, from time to time, decide that the safety of American citizens cannot be fully protected in certain countries."

Statement of Deputy Under Secretary of State, Robert D. Murphy, Hearing Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 1st Sess., pt. 2, at 101 (1957).

[1] See notes 60 and 62, *supra.*

hibit travel of Americans to certain areas to be designated either by the President or one to whom he delegated this power. Sections 1(a), 3, 13. It provided, further, for criminal penalties for a violation of the President's "travel to" restrictions.[8] The Neutrality Act of 1939, was still in effect when the predecessor of § 1185(b) was enacted in 1941.[9] There is nothing

[8] "Whenever the President shall have issued a proclamation [that a state of war exists between foreign states] and he shall thereafter find that the protection of citizens of the United States so requires, he shall, by proclamation, define combat areas, and thereafter it shall be unlawful, except under such rules and regulations as may be prescribed, for any citizen of the United States or any American vessel to proceed into or through any such combat area.

* * * * * * *

In case of the violation of this section by any citizen traveling as a passenger, such passenger may be fined not more than $10,000 or imprisoned for not more than two years, or both.

* * * * * * *

The President may, from time to time, promulgate such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out any of the provisions of this joint resolution; and he may exercise any power or authority conferred on him by this joint resolution through such officer or officers, or agency or agencies, as he shall direct."

See also the Act of February 4, 1815, 3 Stat. 195, 199–200 (prohibiting travel to Canada and other British Possessions during the war of 1812).

[9] Sections 2 (prohibiting commerce with States engaged in armed conflict), 3 (prohibiting travel in combat areas) and 6 (prohibiting the arming of merchant vessels) were repealed by joint resolution on November 17, 1941, 55 Stat. 764. The legislative history of this repealer statute would give no support to an argument that these sections of the said act were repealed because it was felt that the Act of June 21, 1941, covered the same subject. See *e.g.*, 87 Cong. Rec. 7958 (1941); Statement of the Secretary of State before the Committee on Foreign Affairs, House of Representatives, reprinted at 36 Am. J. Int'l L. 118–121 (1942).

to indicate that the Congress intended, *sub silentio*, to include these "travel to" restrictions, imposed under this act, in the departure and entry statute, the border control statute it enacted two years later.

CONCLUSION

The court finds that the defendants Laub and Martinot departed from and entered the United States bearing valid passports within the meaning of "depart," "enter" and "valid passport" in 8 U.S.C. § 1185 (b); that, although they and the defendant Schlosser agreed among themselves and with the other alleged co-conspirators named in the indictment to induce others to do likewise and acted in furtherance thereof, the said agreement and the said acts do not constitute a crime under 18 U.S.C. § 371. If, as the court concludes, there is a gap in the law, the right and the duty, if any, to fill it devolves upon the legislative, not the executive or judicial branch of the Government.

This opinion constitutes the court's findings of fact and conclusions of law. Settle any further proposed findings and conclusions and a proposed order on or before fifteen (15) days from the date hereof.

JOSEPH C. ZAVATT,
Chief Judge.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 176

UNITED STATES OF AMERICA,
Appellant,

v.

LEE LEVI LAUB, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MEMORANDUM FOR APPELLEES

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v.

LEE LEVI LAUB, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MEMORANDUM FOR APPELLEES

In our view, the decision below is clearly correct regardless of whether the case is distinguishable, as appellants believe, from that of *Travis* v. *United States,* No. 963, this Term, certiorari granted April 18, 1966. Nevertheless, we agree that the question is substantial, that probable jurisdiction should be noted and that this case should be set down for argument together with *Travis.*

However, we request that this case not be placed upon the summary calendar. A thorough discussion of the constitutional problems, of the legislative history of the statutes involved and of the administrative implementation will require at least the full hour of oral argument provided by Rule 44(4) of the Rules of this Court. This view is also based upon the undersigned counsel's experience in *United States* v. *Laub,* 64 Cr. 137 (Juris. St., pp. 8-66), as well as in *Kent* v. *Dulles,* 357 U. S. 116, and *Zemel* v. *Rusk,* 381 U. S. 1. Aside from the differences between the instant

case and that of *Travis*, it would be impractical to divide the legal argument of this important and complex case with other counsel, particularly since the legislative history requires an extensive and coherent presentation.

The undersigned counsel appears for all of the defendants herein except Phillip Abbott Luce who did not join in the motion to dismiss the indictment; Mr. Luce testified as a Government witness in *United States* v. *Laub*, 64 Cr. 137, and presumably would have been a Government witness in the instant case. We have no knowledge as to his standing upon the present appeal, but in any event his interests are different from those of the appellees upon whose motion the indictment herein was dismissed.

Respectfully submitted,

Leonard B. Boudin,
Victor Rabinowitz,
Attorneys for Appellees.

May 31, 1966

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IN THE

Supreme Court of the United States

October Term, 1966

No. 176

UNITED STATES OF AMERICA,
Appellant,

against

LEE LEVI LAUB, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

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PRESIDENTIAL PROCLAMATIONS, EXECUTIVE ORDERS, DEPARTMENTAL REGULATIONS

PRESIDENTIAL PROCLAMATIONS:

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No. 176

UNITED STATES OF AMERICA,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

Opinion Below

The order of Chief Judge Joseph C. Zavatt of the court below dismissing the indictment (R. 5-7) is unreported. The opinion of Judge Zavatt in the related case of *United States* v. *Laub* (R. 8-62) is reported at 253 F. Supp. 433 (E. D. N. Y. 1966).*

Jurisdiction

The District Court's order dismissing the indictment was entered on May 5, 1966 (R. 5-7). A notice of direct appeal to this Court was filed on May 20, 1966 (R. 63), and the Court noted probable jurisdiction on June 13, 1966

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* The undersigned counsel represent all appellees other than appellee Luce.

(R. 64; 384 U. S. 984). The jurisdiction of this Court rests upon 18 U.S.C. §3731 upon the ground that the dismissal of the indictments was "based upon the . . . construction of the statute" upon which the indictments were founded.

Questions Presented

This case presents the following questions:

1. Whether violations of area restrictions upon travel in foreign countries imposed by the Secretary of State are criminally punishable under Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b).

2. Whether Section 215(b), if so construed, is unconstitutional for vagueness and lack of legislative standards.

Statutes, Proclamations, Executive Orders and Regulations Involved

The statutes, proclamations, executive orders and regulations involved are set out in the Appendix, pp. 42-54, *infra*.

Statement

Appellees were charged in a one-count indictment filed in the United States District Court for the Eastern District of New York with conspiring to violate Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b), by arranging for the travel to Cuba of American citizens who did not possess passports endorsed for travel to that country (R. 1-2). The Government alleged in a bill of particulars that the individuals whose travel had been solicited possessed "unexpired and unrevoked United States passports which. . . had not been specifically validated by the Secretary of State for travel to Cuba" (R. 4).

The District Court granted appellees' motion to dismiss the indictment (R. 5-7), incorporating its opinion in *United*

States v. *Laub*, 64 Cr. 137 (E.D.N.Y.), a companion case involving two of the appellees and other defendants, who had been similarly indicted, with reference to an earlier trip to Cuba (R. 8-62). In that case, which had been tried before the same district judge without a jury, the Court had acquitted the defendants on the ground that departures from the United States with unexpired and unrevoked passports do not violate Section 215(b) regardless of whether the departing individuals contemplate travel to an area "restricted" by the Secretary of State (R. 45).

The conclusion of the court below that Section 215 is not the source of the power to impose area restrictions is based upon a thorough study both of that statutory provision and the very different matter of area controls. The reasoning of Judge Zavatt may be thus summarized: Section 215 is a border-control statute which requires a valid passport for an American citizen's entry into or departure from the United States, with minor exceptions embodied in regulations relating to the Western Hemisphere generally. A valid passport is one which has not expired nor been revoked, and its endorsement for travel to a particular country is irrelevant to the issue of its validity for departure from and entry into the United States.

The court relied upon the language of Section 215, upon the legislative history of its predecessor statutes, and upon its consistent administrative interpretation and practice. It also relied upon the expert testimony of a State Department official (R. 23). Adopting the strict construction required of a criminal statute affecting a basic liberty (R. 41-42), Judge Zavatt found that the committee reports and debates "were concerned with the uncontrolled departure and entry of citizens of the United States" who might be engaged in illegal activities (R. 41-42), and that in almost thirty years of operation of these border-control laws there had been no previous attempt to apply them to the more than 600 violations of area restrictions (R. 23).

Such area restrictions, said Judge Zavatt, were based exclusively upon a different statute, the Passport Act of 1926, 22 U.S.C. 211a, and upon the predecessor Passport Acts. The court noted the State Department's admissions that no criminal sanctions could be imposed upon violators of area restrictions; and that the Department had unsuccessfully sought of Congress "the very power claimed by the Government in the instant case" (R. 39). Judge Zavatt said, "If, as the court concludes, there is a gap in the law, the right and duty, if any, to fill it devolves upon the legislative, not the executive or judicial branch of the Government" (R. 45).

Summary of Argument

I

This case presents important issues concerning the nature of the constitutional right to travel, the circumstances under which it can be impaired, and the dual functions of the passport, *i. e.*, the national security function of protecting borders of the United States and the political, quasi-diplomatic or foreign affairs function of securing safe conduct for American citizens abroad. The first such function was treated by this Court in *Kent* v. *Dulles,* 357 U. S. 116, the second in *Zemel* v. *Rusk,* 381 U. S. 1.

The Government's brief is permeated by confusion concerning these two functions which is central to its argument. For this reason and in order to avoid undue repetition of the petitioner's brief in *Travis* v. *United States,* No. 963, which we adopt, we propose to treat of the matter conceptually by discussing, first, the foreign affairs function underlying area restrictions and, second, the national security function which is the basis for the departure and entry controls involved in this case.

II

There is a half century history of passport restrictions and endorsements for travel to particular areas. These limitations or reservations have always been regarded as a foreign affairs function; the passport was a "political document", *Urtetiqui* v. *D'Arbel*, 9 Pet. 692, 699, to ensure the good treatment of citizens abroad. The passport was issued upon a claimed inherent executive power over foreign affairs and since 1856 upon the authority of a passport statute.

The State Department has never claimed that these restrictions upon travel to particular areas had the nation's security as their objective, were predicated upon border-control statutes, or were enforceable by criminal sanctions. Indeed, it publicly asserted the contrary. Hence, in recent years the Department has sought, although unsuccessfully thus far, the statutory authority to impose area restrictions, making violation of such restrictions a criminal offense.

The restrictions upon travel to Cuba are also the exercise of a foreign affairs power. The very language of Public Notice No. 179, 26 Fed. Reg. 492, and the accompanying Press Release No. 24, *infra* pp. 52-53, shows that they claim to be based exclusively upon the Passport Act of 1926 and the implementing Executive Order 7856 of March 31, 1938, 3 Fed. Reg. 799.

III

In contrast, Section 215 of the Immigration and Nationality Act of 1952 is a border-control statute, *affecting both citizens and aliens*, in the interest of national security, and enforced by criminal sanctions.

The construction of this statutory provision was expressly left open in *Zemel* v. *Rusk*, *supra*, where the Court declined to decide whether its criminal sanctions could be used to enforce the Secretary's promulgation of area re-

strictions under a different statute. That issue may now be resolved not only by reference to the statutory language but to its manifest purpose, its legislative history and its administrative implementation.

This statute does not authorize the imposition of foreign area controls, nor has the Government ever claimed that to be the case until it instituted the criminal proceedings in the three Cuba travel cases involved herein. Nor is Section 215 cited in the Public Notice and Press Release as the source of power to impose the restrictions in passports upon travel to Cuba.

The Government admits that its proposed construction is not to be found in the language of Section 215 which is silent on the subject of area restrictions. The statute refers exclusively to departure from and entry into *the United States*. The parallel provisions for aliens make clear the legislative concern for national safety, not for the destination of the traveler.

The extensive legislative history of Section 215 shows that it was a war measure intended to seal the United States borders against espionage by aliens and citizens alike. The Government, while demonstrably wrong in describing this history as "meager", significantly observes that Congress showed no "awareness" of the problem of area restrictions to which the Government would now apply this border-control statute (Br. 20).*

The administrative implementation of Section 215 and its predecessors supports the construction of the court below. No proclamations, executive orders or regulations issued under these entry-departure statutes purported to authorize area restrictions. Although at least 600 persons have traveled to so-called restricted areas, the present group of Cuba travel cases is the first in American history to involve criminal prosecutions.

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* References "(Br.)" are to appellant's brief.

The legislative and the executive branches of the government acquiesced in this interpretation of Section 215 until the very recent criminal proceedings involving travel to Cuba. The Commission on Government Security recommended in 1957 the amendment of Section 215 to make travel to restricted areas a crime. Following *Kent* v. *Dulles,* President Eisenhower urged the passage of a passport act in 1958 to achieve the same objective, and these two proposals have been repeated year after year both in Congress and by the Department of State. Congress has refused to amend the statute.

IV

The Government's construction of Section 215 would make the statute unconstitutionally vague in violation of the Fifth and Sixth Amendments. It would turn a clear national security system of border control into a vague foreign affairs system of determining to what areas Americans may travel. It would require a re-definition of the statutory language. It would make the validity of a passport depend not upon the objective fact of its non-expiration, but upon the intended destination of the traveler.

This construction is contrary to Section 215's plain statutory language, legislative history, and to both administrative practice and implementation. It would import into this criminal statute affecting a fundamental liberty a vagueness which violates the first essentials of due process.

Viewed as delegated authority to determine to which countries American citizens might travel, violation of which is criminally punishable, the statute contains no standards whatsoever to guide the executive. The legislative history and administrative practice contain not the slightest indication of what standards should govern area restrictions. Thus construed, the statute fails to pass the constitutional test enunciated in *Kent* v. *Dulles, supra,* that "the standards must be adequate to pass scrutiny by the accepted tests", 357 U. S. at 129.

ARGUMENT

I

Introduction: The constitutional right to travel and the passport's two functions.

This case presents very important issues concerning the nature of the constitutional right to travel and the circumstances, if any, under which it can be impaired. It also requires a delineation of the dual functions of a passport: first, the political function of seeking safe conduct for an American citizen abroad; and, second, the national security function of controlling departure from and entry into the United States.

In *Kent* v. *Dulles, supra,* this Court dealt with the long-standing practice of the State Department to deny passports to American citizens by reason of membership in the Communist Party and other political associations regarded with disapproval by the Department. The Solicitor General's brief in the *Kent* case (and the dissenting opinion therein) sets forth fully the national security considerations urged by the Government together with an impressive array of precedents for the Department's denial of passports for political reasons.

Nevertheless, this Court concluded that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment", *Kent* v. *Dulles, supra,* at 125. Noting "how deeply engrained in our history this freedom of movement is", *id.* at 126, the Court described its practical and political value, and concluded that it was "basic in our scheme of values", *ibid.*

In the light of this evaluation, the Court held that if the liberty of travel was to be regulated "it must be pursuant to the law-making functions of the Congress", *Kent* v.

Dulles, 357 U. S. at 129, that "if that power is to be delegated, the standards must be adequate by the accepted tests", and that the Court would "construe narrowly all delegated powers that curtail or dilute" the right to travel. It accordingly concluded "that § 1185 [*i.e.*, Section 215] and § 211a do not delegate to the Secretary the kind of authority exercised here", *id.* at 129, stating:

> "We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement." *Id.* at 130.

Subsequently, in *Aptheker* v. *The Secretary of State*, 378 U.S. 500, the Court declared unconstitutional § 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. § 785, which, as applied, denied passports to Communist Party members because the Party had been ordered to register under the Act, held constitutional in *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1. The Court reaffirmed what it had said in *Kent* about the constitutional right to travel abroad. It added that "freedom of travel is a constitutional liberty closely related to rights of free speech and association . . .", *id.* at 517. And it declared the statute unconstitutional because it "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment." *Id.* at 505.

In the third of the major passport cases, *Zemel* v. *Rusk*, 381 U.S. 1, the Court refused to compel the Secretary of State to endorse a passport for travel to Cuba. It upheld the Secretary's refusal upon the basis of the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211a, which provided in pertinent part:

"The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States . . ."

The Court was of the view that the Secretary of State was entitled under the Passport Act in the interests of foreign affairs of the United States to refuse the requested endorsement; in short, *the Court was there treating with the political function of the passport rather than with the function of exit and entry control.*

The Court declined to consider the Solicitor General's argument, that "travel in violation of an area restriction imposed upon an otherwise valid passport is unlawful under the 1952 Act." *Zemel* v. *Rusk, supra* at 12. It also declined to issue an injunction against the criminal prosecution of Zemel in the event that he should travel, *id.* at 19, and it noted the variety of circumstances under which such travel might occur.

The instant case presents new variants of the constitutional and statutory problems: (i) Did Congress intend in passing Section 215 to prevent and punish travel to particular areas. (ii) If so, is the criminal prohibition constitutional in view of its vagueness, its lack of notice (indeed, its counter-representation to the public) and its total lack of standards.

II

Area restrictions are a political function exercisable under a claim of inherent or statutory foreign relations power.

The history of passport endorsements and restrictions upon travel to particular areas is set forth in considerable detail in this Court's opinion in the *Zemel* case, and need

not be repeated here. The significance of the history is that (i) the exercise of this power was regarded as a foreign relations (not a national security) function; (ii) the passport was treated as a political or quasi-diplomatic document rather than a security control over entry and departure; (iii) the Secretary's actions were bottomed upon either an inherent executive power or, more recently, a passport act; and (iv) criminal sanctions were never regarded as enforcing such "restrictions."

A. Past Restrictions Have Always Been Based Upon Foreign Policy.

The area restrictions promulgated by the Secretary over the years have been based upon a variety of foreign policy considerations arising from non-recognition of foreign governments or from the inability to protect American citizens in troubled foreign areas.

This is true of the first cited restrictions imposed because of a famine in Belgium in 1915, *Zemel v. Rusk, supra,* at 8. It is reflected in our policy during the Ethiopian War of 1935 and the Spanish Civil War of 1936-7.[1] Most of the post-World War II instances reflected our disagreement with the policies of the Soviet Union and associated countries. In some cases, American citizens had been mistreated abroad and the United States Government either wished to show its disapproval of such treatment or to emphasize that it was unable to give diplomatic protection.

This reliance upon the exclusively foreign relations basis is a fundamental principle of the State Department. Thus, in recent congressional committee hearings, the Acting Administrator of the Bureau of Security and Consular Affairs said that "our restrictions have always been

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[1] See the Court's opinion in *Zemel* v. *Rusk, supra,* written by the Chief Justice, and Mr. Justice Goldberg's dissenting opinion at p. 27, which contain a full history of the restrictions.

imposed on a foreign affairs basis, our area restrictions", *Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act, etc.*, of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. on S. 3243 (May, 1966) p. 61.[2]

The political aspect of area restrictions is emphasized by the Department's statement that "all [the area restrictions] but Cuba are handled by press statements", *Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act, supra* at 59. Obviously, if such restrictions were based upon national security statutes with criminal sanctions, more formal and precise notice to the public would have been required and employed. And when the Department seeks statutory authority for area restrictions, its proposed bill is a United States Passport Act "to promote the foreign policy of the United States", H.R. 14895, 89th Cong., 2d Sess., and a substitute for the present Passport Act. In contrast, Senator Eastland's proposed bill S. 3243, 89th Cong., 2d Sess., would amend, over departmental objections, Section 215 by turning it into an area restriction statute thereby accomplishing —for the future—the purposes of the Government in the instant litigation.

What is significant here is not only the joint recognition of the need to amend the law (see *infra* at 34) but its consistency with the Department's view that area restrictions are matters of foreign policy, and that departure and entry border controls are matters of internal security. As the Acting Administrator of the Bureau of Security and Consular Affairs so succinctly put it: "I never had

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[2] This statement by Mr. Philip B. Heymann, an administrator and scholar of recognized ability was not inadvertent; it was constantly repeated during the hearings. See, *e.g.*, his statement that "our concept of travel controls is restricted to foreign affairs" *id.* at 61, and his claim that the travel to Albania "appears to concern the conduct of foreign relations and nothing else", *id.* at 61.

any doubt that *Zemel* v. *Rusk* would be looked at as a foreign policy case, and I actually think that is what happened", *Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act, supra* at 57.

The remarks of the Acting Administrator just quoted above together with the examples of geographic limitations recited in the several opinions of *Zemel* v. *Rusk, supra,* show positively that the restrictions had nothing whatsoever to do with national security and the related system of border control. This is also manifest from the fact that many of the "restrictions" occurred prior to August 8, 1918 and during the period from March 3, 1921 to November, 1941 when no border control statute was in effect.[8] *Zemel* v. *Rusk, supra,* at 8-10.

The foreign relations power was always the source of authority for these area restrictions. When in 1938 the President authorized the Secretary in his discretion "to restrict the passport for use only in certain countries . . .", Exec. Order 7856, 3 F.R. 799, the claimed authority for that order was a passport statute, the Passport Act of 1926, *supra,* see 22 C.F.R. § 51.75 (1958).

B. The Restrictions on Cuban Travel Arise From the Breach in Diplomatic Relations.

Hence, when the Secretary came to issue Public Notice 179, 26 F.R. 492, *infra* at 51, on January 16, 1961, that notice asserted as authority only Executive Order 7856 and

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[8] See Act of May 22, 1918, 40 Stat. 559, effective on August 8, 1918 by Proclamation No. 1473, 40 Stat. 1829, et seq., and Exec. Order No. 2932, containing implementing regulations, 1918 For. Rel. Supp. 2, 815. It was in effect until March 3, 1921 when H. Res. 64, 41 Stat. 1359, et seq., terminated the existing state of war for the purpose of such wartime legislation. See Act of May 27, 1941, 55 Stat. 1647, invoked by Proclamation No. 2523, 55 Stat. 1696, November 14, 1941, and implemented by the Secretary's Regulations, published on November 28, 1941, 6 F. R. 6069.

the Passport Act of 1926 and the restrictions were based upon "conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America."

The Secretary's press release of the same day indicated the quasi-diplomatic or foreign policy considerations by announcing that passports must be specifically endorsed because of the United States Government's "inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba," *infra* at 52. The press release added that "[t]hese actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations", *infra* at 53.

In *Zemel* v. *Rusk*, this Court held that these area restrictions had been asserted by the Executive under Passport Acts prior to that of 1926, and that this practice "supports the conclusion that Congress intended in 1926 to maintain in the Executive the authority to make such restrictions", *Zemel* v. *Rusk*, *supra* at 9. The Court also noted the "post-1926 history of Executive imposition of area restrictions", *id.* at 11, and that "[d]espite 26 years of executive interpretation of the 1926 Act as authorizing the imposition of area restrictions", Congress in enacting the Act of 1952 "left completely untouched the broad rule-making authority granted in the earlier Act", *id.* at 12.

C. The State Department Has Always Agreed That Area Restrictions Are Not Criminally Enforceable Prohibitions Upon Travel.

Long prior to the present litigation, the Department announced to the public that the restrictions made under its foreign relations power were not prohibitions upon travel or, more to the point, prohibitions whose violation would have criminal consequences. Its press release of May 1, 1952 stated:

> "This passport is not valid for travel to [specified countries] unless specifically endorsed under authority of the Department of State as being valid for such travel." [5]

At the same time, the Department stated that it was *not* a travel prohibition:

> "In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas. It contemplates that American citizens will consult the Department or the consulates abroad to ascertain the dangers of travelling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized." *Ibid.*

The Association of the Bar of the City of New York in discussing this press release states:

> "This appears to have been an honest admission of the lack of statutory power to enforce an area restriction of this nature." *Freedom to Travel—Report of the Special Committee to Study Passport Procedures*, 70 (1958)

> "The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case." *Ibid.*

This press release was the subject of repeated inquiries before congressional committees. On April 2, 1957, Senator Fulbright examined Deputy Under-Secretary of State

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[5] Press Release No. 341 quoted in *Hearing before the Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. (1957), p. 17; *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957) 40.

Murphy and his associates on the subject before the Senate Foreign Relations Committee. The Department's responses then and later were correctly regarded by the committee as non-responsive; they were certainly extremely vague,[6] *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957), pp. 14-15, 40-41, 54, 78.

The Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary was also interested in the implications of this press release. On July 4, 1957, Senator Joseph O'Mahoney called it to the attention of the senior departmental officials. They were able to cite no statute making it a crime to travel to a "proscribed" country, *Hearings before the Sub-Committee on Constitutional Rights of the Senate on the Judiciary*, 85th Cong., 1st Sess. (1957), pp. 17, 93-95.

The Foreign Relations Committee had also inquired as to the reasons for passport restrictions, the significance of the term "valid" and the existence *vel non* of criminal sanctions. The Department replied that a restrictive passport meant that "if the bearer enters country X he cannot be assured of the protection of the United States . . . it means that the United States does not approve of the bearer's going to country X. The restriction on the passport does not necessarily mean that if the bearer travels to country X he will be violating the criminal law", *Hearings before the Senate Foreign Relations Committee* (1957), *supra* at 59.

The Department's determination of the countries for which it approved such travel was admittedly a policy

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[6] The Department's efforts to reinterpret this release have not been very persuasive. See also *Hearings before the Senate Committee on Foreign Relations on Passport Legislation*, S. 2770, S. 3998, S. 4110 and S. 4137, 85th Cong., 2d Sess. (1958), p. 27. Elsewhere its representatives have expressed some doubt as to whether a violation of the regulations is a violation of the Passport Laws. See *e.g., Senate For. Rel. Hearings 1957, supra* at 31, 59.

decision based upon such matters as diplomatic relations and the safety of the citizen, *Hearings before the Sub-Committee on Constitutional Rights* (1957), *supra* at 25-26. As an official testified, the significance of the phrase "not valid" means "this this Government is not sponsoring the entry of the individual into those countries and does not give him permission to go in there under the protection of this Government." *Id.* at 86; see also *id.* at 62.

Specific inquiry was made by the Committee on Foreign Relations concerning the travel of William Worthy to China. Significantly, the only section referred to by the Department was 18 U. S. C. § 1544 which relates to the misuse of a passport. *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies,* 85th Cong., 1st Sess. (1957) p. 24. Similarly, see the *Judiciary Committee Hearing, supra,* at 91.

III

Section 215 is a border-control statute and does not authorize area restrictions.

A. Introduction

This statute in its language, purpose, legislative history and implementation has nothing whatever to do with area restrictions. It is a border-control statute.

The statute is not cited as authority for the area restrictions imposed by Public Notice 179, 26 F.R. 492 (App., *infra* at 51) or by Departmental Regulation 108.456, 26 F.R. 482 (Jan. 19, 1961), amending 22 C.F.R. 53.3(b) (1957) (App., *infra* at 50). Indeed, in *Zemel* v. *Rusk,* 228 F. Supp. 65 (D. Conn. 1964), District Judge Blumenfeld viewed the area restrictions under attack as "promulgated under § 211(a)" (*id.* at 79) and stated that "the secretary expressly disclaims reliance upon [8 U.S.C. 1185]" here as

a source of authority for the regulation excluding travel to Cuba, *id.* at 81.

In *Zemel* v. *Rusk*, *supra*, no Justice of this Court adopted the Government's argument that "Section 215 of the Immigration and Nationality Act confirms the authority of the Secretary to impose area restrictions in the issuance of passports and prohibits travel in violation thereof", *Zemel* v. *Rusk*, No. 86, Oct. Term, 1964, Brief for the Appellees, p. 56. Instead, the Court expressly reserved the question and relied exclusively upon the Passport Act, *Zemel* v. *Rusk*, *supra* at 12.

The Government agrees in this case that "Section 215(b) does not in so many words prohibit violations of area restrictions" (Br. 11). It agrees that no legislative history supports its position; it does not respond to that recited by the Court below (R. 42-45); it describes the congressional committee reports as "meager" (Br. 20), and says that the debates did not "show any awareness of this problem" (Br. 20). It relies not upon what Congress did, but what Congress must have "intended" (Br. 23) or "meant" (Br. 23), and upon the "premises from which Congress must have proceeded" (Br. 25). As will be seen below, the Government has adopted a novel approach for the construction of a criminal statute which, in addition, affects the exercise of fundamental liberties.

B. The Plain Meaning of the Statutory Language

This case is governed by Mr. Justice Reed's statement that:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the

legislation. In such cases we have followed their plain meaning." *United States* v. *American Trucking Association*, 310 U.S. 534, 543.

The language of Section 215 is not ambiguous. A valid passport is a passport in usual form which has neither been revoked nor lapsed by passage of time. The terms "entry and departure" refer explicitly to crossing the borders of the United States in either direction, not to crossing the borders of a foreign country. The term is used in the same sense as Congress used it in the Narcotic Control Act of 1956, 18 U.S.C. 1407, 70 Stat. 574. See *United States* v. *Eramdjian*, 155 F. Supp. 914 (S.D. Cal. 1957), *aff'd sub nom., Reyes* v. *United States*, 258 F. 2d 774 (9th Cir. 1958).

The Court has held in *Zemel* that the language of the Passport Act providing that the Secretary "may grant and issue passports" was "broad enough to authorize area restrictions," *Zemel* v. *United States, supra* at 8. Clearly, that cannot be said of a statute which is silent on the subject of passport issuance. Indeed, it has always been assumed that Section 215 refers to entry and departure from the United States. See, *e.g.*, 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2d rev. ed., 1945) at 1202, 1205.[7] As the District Court noted below (R. 44-45), when Congress intended to prohibit travel in particular areas or on particular means of transportation, it was capable of using unmistakable language for such purposes. The Act of February 4, 1815, 3 Stat. 199, directed that no citizen or resident "be permitted to cross the frontier into the enemy's country or territory in its possession without a passport." The Act of June 30, 1834, 4 Stat. 729, is another example of an explicit area limitation. And the Neutrality Act of

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[7] See also the Department's description of the Secretary's authority in emergency situations "as the method of controlling the departure from and re-entry into the United States by American citizens." *Senate For. Rel. Hearings 1958, supra* at 25.

1939, 22 U.S.C. §441(3a), (5a), made it unlawful to travel "into or through any such combat area" or "on any vessel of any state named in such proclamation."

The meaning and purpose of the statute is demonstrated further by the fact that Section 215(a)(1) makes it unlawful "for any alien to depart from or enter or attempt to depart from or enter the United States", subject to presidential rules, limitations and exceptions. Similar provisions were in the preceding Acts of 1918 and 1941. The present statute was implemented as to aliens by the same Proclamation, No. 3004, January 17, 1953, 67 Stat. C31, which relates to citizens, and by departmental regulations now codified at 22 C.F.R. 46.1-46.7.

It is apparent from the controls over alien departure that Section 215 has never been regarded as carrying out a foreign affairs function of the kind which underlies passport restrictions under 22 U. S. C. 211(a); the United States Government is not concerned with the protection of aliens abroad. The departmental regulations in 22 C.F.R. Part 46 are keyed exclusively to matters relating to national defense.

The Government seizes upon the single word, "valid", in the statute in an effort to turn the statute into one which authorizes the imposition of area restrictions. It says that the statutory requirement that a citizen must bear a "valid" passport in order to depart from or enter the United States means a passport validated for a particular foreign country, and that this makes it an area restriction statute.

The decisive objection to this tortuous argument is that it is not germane to the purpose and legislative history of the statute which was to seal American borders against espionage and related activities. Of course, it is the Government, not the statute, which uses such terms as "validity", "restricted" and "endorsed". There is nothing in the general definition of a passport set forth in

8 U. S. C. 1101(a)(30), upon which the Government relies, which negates our construction. Contrary to the Government's suggestion, Section 1101(a)(30) does not condition the validity of a passport upon its utility for entry into *every* foreign country. The term "valid passport" is satisfied by a standard passport which is issued to virtually all citizens who request them. Any ambiguity about the term should be resolved in favor of the appellees herein since it is a criminal statute affecting personal liberty, *Kent* v. *Dulles, supra.*

In *Zemel,* the Chief Justice in his opinion for the Court, discussed the variety of situations in which travel to a restricted area might occur, *Zemel* v. *Rusk, supra* at 19. That very complexity shows the necessity for a construction of the statute protective of the liberty of the citizen.

Finally, it should not be overlooked that whatever reference is made in statute or regulation to the matter of validity relates exclusively to the question of the duration of the passport. This may be seen in 22 U. S. C. § 217a. See also Executive Order 7856 where the term "restricting its validity" clearly refers to duration, 22 C.F.R. 51.115-117, 51.119, 55.121, 55.124. The Department's own handbook defines the term "valid passport" as "a passport, the validity of which has not expired", Department of State, Passport Office, *Clerk of Court Handbook of Passports* (Aug. 1, 1958), Chapter 300, § 311, p. 10.

C. The Legislative History and Purpose

The legislative history of Section 215 and of its predecessor statutes, the Act of May 22, 1918, 40 Stat. 559, and the Act of June 21, 1941, 55 Stat. 252, shows that Section 215 was a war measure intended to seal off the borders of the United States by requiring passports of American citizens for entry into and departure from the United States, and by requiring permission for aliens similarly desiring to cross American borders.

The Government makes no claim that the legislative history supports its position; it prefers to describe that history as being "consistent" with its position (Br. 20). But even this modest assertion is incorrect and no reader of the House and Senate reports on the bill which became the 1918 Act could describe those comprehensive and informative reports as "meager".

The Government is correct in stating that "[n]or do the debates on the floor of either chamber show any awareness of this problem [area restrictions] by the sponsors of the legislation or those who questioned them" (Br. 20). The explanation is simple and dispositive; the bill did not deal with area restrictions.

The Government's argument constitutes a pyramid of conjecture unsupported by any judicial decisions or cases governing the construction of criminal statutes. It says that the Congress in 1918 must have known what the Department representatives testified in 1957, namely, that "passports were made valid for specific countries and for specific purposes" during World War I (Br. 21-22). This is, of course, completely irrelevant since the "wartime passport policy" (Br. 21) was a policy of departmental passport restrictions unsupported by sanctions. The Government's argument proves too much; if the practice of making passports "valid for specific countries and for specific purposes" is relevant, then a passport would be valid only if used for the travel purpose specifically set forth in the application—a manifestly absurd result.

The Government's basic argument, equally conjectural, is that it is "unlikely that Congress intended to leave the large gap in the enforcement of area restrictions" (Br. 11; see also 21-23). But Congress was not interested in that subject in 1918, 1941 or 1952. Indeed, it shows a singular disinterest in area restrictions even today.

(1) The original border control statute, the Act of May 22, 1918

The Act of 1918 was a war measure directed at such crimes as espionage by restricting the entry into and departure from the United States of both aliens and citizens.[8] The House Foreign Affairs Committee which added the section relating to the travel of citizens [9] explained the bill as follows (H. Rep. 485, 65th Cong., 2d Sess., pp. 2-3):

> "The bill is intended to stop an important gap in the war legislation of the United States. * * * American citizens and neutrals [are] perfectly free to come and go. No argument is necessary to indicate the probability that Germany will wherever possible employ renegade Americans or neutrals as her agents instead of employing Germans about whom suspicion would easily be excited. The danger of the transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive department have power to curb the general departure and entry of travelers.
>
> New legislation is the only remedy. * * *
>
> * * * It will be observed that citizens need not secure such permits as are required of aliens, but must bear valid passports. Passports will continue to be issued as at present by the Department of State, and there is no reason to believe that any American

[8] It was suggested by President Woodrow Wilson in his Address to Congress on December 4, 1917, where he emphasized the necessity of creating "a very definite and particular control over the entrance and departure of all persons into and from the United States." As the Committee on Foreign Affairs of the House of Representatives pointed out: "The Attorney General in his report for 1917 made a similar recommendation. The Department of Justice proceeded to draft the bill now under discussion, which was referred to and received the approval of all the other executive departments interested in the matters to which it relates. It was introduced in Congress on February 26, 1918." H. Rep. 485, 65th Cong., 2d Sess., p. 2.

[9] See 56 Cong. Rec. 6029.

citizen will be unduly inconvenienced by these restrictions. That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined."

The bill was limited to war and required a Presidential finding concerning "the public safety" to justify the prohibition of entry into and departure from the United States without permission (56 Cong. Rec. 6029).[10]

Mr. Flood, its principal spokesman, emphasized the fact that it was a war measure intended "to control ingress and egress from this country" (56 Cong. Rec. 6029). A principal purpose, in his view was to prevent "traitors [from getting] the chance to come back and spy on our military operations" (56 Cong. Rec. 6064). The record is replete with references to "suspects", "traitors" and "suspected spies" (56 Cong. Rec. 6031, 6064, 6067). When it was suggested that they could be criminally prosecuted if permitted to enter, he responded that because there were difficulties of proof "these are people who ought to be now out of the country and kept out until the war ends" (56 Cong. Rec. 6066). Mr. Flood added that all nations at war "have found it

[10] "Mr. Moore of Pennsylvania: The gentleman advances this as a war measure and puts it on that ground?

Mr. Flood: Absolutely. It is limited to the duration of the war." (56 Cong. Rec. 6030)

necessary to control travel to and from their countries" and that "Germany has . . . closed its borders entirely" (56 Cong. Rec. 6067).[11]

In the Senate, its Judiciary Committee also pointed out that the "danger of transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive departments have power to curb the general departure and entry of travelers" (S. Rep. No. 431, 65th Cong., 2d Sess., p. 2).[12] Mr. Shields, spokesman for the bill, described it as a "supplement to the espionage acts" (56 Cong. Rec. 6191) and said: "The object of it is to control the entry and departure of all persons in or from their territory. It is a war measure and in line with the legislation that has been enacted by all the nations engaged in the war" (56 Cong. Rec. 6191). The debate in the Senate emphasized that the bill "authorizes prevention of departure and entry" and that it was a "war measure" (see 56 Cong. Rec. 6191, 6192, 6194, 6248).

The resulting statute was entitled "An Act to prevent in time of war departure from or entry into the United States contrary to the public safety", 22 U. S. C. 223, 40 Stat. 559.

The act was approved on May 22, 1918. The executive implementation of the act shows no imposition of area

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[11] There were numerous references to border control and no reference whatever to the imposition of area restrictions. It was understood that passports would not be required for the crossing of the Canadian-American border because of the inconvenience of a passport system to American citizens working in Canada. See, *e.g.*, 56 Cong. Rec. 6192.

[12] The Committee said with respect to a particular citizen that "not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so." *Id.*, p. 3.

restrictions.[13] While the controls as to aliens were continued (40 Stat. 559), since the statute was effective only in wartime, the controls automatically terminated as to citizens on March 3, 1921 at the end of the war (H. Res. No. 64, 41 Stat. 1359, *et seq.*).[14]

(2) The Amendment of June 21, 1941

In 1941, after President Franklin D. Roosevelt had proclaimed an unlimited national emergency,[15] Congress amended the 1918 statute to provide, *inter alia*, that the act could be invoked during the then existing emergency.[16] The legislative history of that statute shows that its purpose was the same as that of its predecessor (S. Rep. 444, 77th Cong., 2d Sess., pp. 1-2). The pertinent Senate Report pointed out the necessity for controlling "the entry into and departure from the United States of persons of all classes" in order to avoid espionage and subversive activities in the United States (S. Rep. 444, 77th Cong., 2d Sess., p. 2).

Again the debates were unequivocal concerning the purpose of the bill and the intended manner of its operation. In the House, Congressman Bloom made reference to

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[13] See Executive Order No. 2932, For. Rel., 1918, 810, 815, for the implementing regulations. The history of those regulations and their operation during World War I, is set forth in 2 Hyde, *International Law Chiefly as Interpreted and Applied By the United States* (1945), pp. 1202-1206. See also *Hearings on The Extension of Passport Control. Hearings before the Committee on Foreign Affairs of the House of Representatives,* 69th Cong., 1st Sess. (1919).

[14] See also Executive Order of June 27, 1920 amending the Order of August 9, 1918 by permitting the departure without a United States permit of hostile or enemy aliens. Hyde, *op. cit. supra* at 1206-07.

[15] Proclamation No. 2487, May 27, 1941, 55 Stat. 1647.

[16] Act of June 21, 1941, 55 Stat. 252.

"a law that prevents aliens and citizens from departing or entering this country during the time this country is at war" (87 Cong. Rec. 5048). Mr. Dickstein said that "this bill distinctly speaks of a person entering and going." *Ibid.*

The debate in the Senate was along the same lines (87 Cong. Rec. 5325-5326, 5387-5389).[17] The significant new element in the Senate debate was Senator Taft's insistence "that the bill should be confined to the present emergency" (87 Cong. Rec. 5386) because it affected a basic liberty. He said that "when in effect we delegate legislative powers to the President, such powers should be confined to the particular emergency for which we are asked to delegate them; and when the emergency is over they should terminate." *Ibid.* Senator La Follette supported Senator Taft's amendment (87 Cong. Rec. 5387) and the bill was eventually limited, so far as citizens are concerned, to "the existence of the national emergency proclaimed by the President on May 27, 1941"; it was agreed to in that form by the House (87 Cong. Rec. 5416). The Taft Amendment is relevant to any consideration of the wartime purpose of this series of statutes. It also has a bearing upon the constitutional problem, *infra* at 36.

The 1941 statute was invoked by the President less than a month before Pearl Harbor.[18] It was implemented by regulations of the Secretary of State requiring passports for entry and departure and not imposing area restric-

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[17] Senator Van Nuys, the principal proponent of the bill, pointed out that "the main objective is to reach certain elements of aliens" (87 Cong. Rec. 5325). He stated that "there is more espionage and subversive activities in the United States today than at any previous time in our history" (87 Cong. Rec. 5386). Senator Taft referred to "travel over the borders of the United States." (*Ibid.*)

[18] Proclamation No. 2523, November 14, 1941, 55 Stat. 1696.

tions.[19] Congress continued the statutory provisions in effect until April 1, 1953.[20]

(3) The present statute

In 1952 Congress repealed the 1918 statute, as amended by the Act of June 21, 1941, 55 Stat. 252, enacting the new law making the provisions subject to invocation during "any national emergency proclaimed by the President . . .", (66 Stat. 190). It is obvious that the basic purpose of the 1952 statute is the same as that of its two predecessors in view of the absence of additional legislative history and the statement in the House Report that the statutory provisions "are incorporated in the bill [Sec. 215] in practically the same form as they now appear in the Act of May 22, 1918 (40 Stat. 559)", H. Rep. 1365, 82d Cong., 2d Sess., p. 53. See also *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 541. In other words, the statute is a wartime measure imposing controls over the departure and entry of aliens and citizens because of the danger of their committing criminal acts affecting the national defense.[21]

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[19] Departmental Order 1003, 6 F.R. 6069. These regulations were amended by Departmental Regulations 11, August 27, 1945, 10 F.R. 11046, and now appear in 22 C.F.R. Part 53.

[20] 66 Stat. 54, 57, 96, 137, 330, 333.

[21] As the Solicitor General correctly points out in his brief in *Kent* v. *Dulles*, *supra* at 55-56:

> "In short, the intended control of departure and entry * was to be carried out by the denial of permits to individual aliens, and by the denial of passports to individual citizens, where the departure or entry of such persons was deemed 'contrary to the public safety' in the context of the war or emergency which required the invocation of the restrictions."
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> * The 1918 statute (40 Stat. 559) was entitled 'An Act to prevent in time of war departure from or entry into the United States contrary to the public safety'" [asterisk supplied in place of number].

The administrative implementation of this statute of 1952 likewise supports the narrow construction required by the Court in the *Kent* case for constitutional reasons. On January 17, 1953, the President promulgated Proclamation 3004, 67 Stat. C31, significantly entitled, "Control of Persons Leaving or Entering the United States by the President of the United States of America", *infra* at 46. The Proclamation stated that "the exigencies of the international situation and of the national defense still require" that the statutory restrictions upon departure and entry be continued "in the interests of the United States", *ibid.* The regulations of the Secretary relating to departure and entry which had been issued in 1941 were expressly incorporated, as amended, in the Proclamation, *infra* at 48. Neither the Proclamation nor the regulations do more than require passports for departure from or entry into the United States.

D. The Test of Administrative Implementation.

In *Zemel* v. *Rusk, supra* at 11, the Court stated that "[t]he interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute. *Udall* v. *Tallman*, 380 U. S. 1, 16-18; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315."

Applying these tests, the Court held in *Zemel* that there was a history of passport area restrictions and that those restrictions were imposed pursuant to the Passport Act of 1926. Applying the identical test here, it is obvious that the Immigration Act is supported by no such administrative interpretation and implementation.

We have already shown that the Presidential proclamations and executive orders under the border-control acts were limited to the matter of entry and departure and did not purport to authorize area restrictions pursuant to the Immigration Act and its predecessors.

The one reference to area restrictions makes it doubly clear that the source of area control was not a border control statute. Thus, Presidential Proclamation No. 3004, 67 Stat. C31, which was issued in 1953 pursuant to Section 215(b), specifically stated that the departure of citizens would be governed by 22 C.F.R. 53.1 to 53.9. Section 53.8 of 22 C.F.R. provided in pertinent part [22 C.F.R. (1949 ed.) 53.8]:

> "§ 53.8 *Discretional exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries."

In short, the Proclamation noted the Secretary's powers under 22 C.F.R. 53.8 (*which were derived from the Passport Act*) and stated that the proclamation was not intended to *deprive* the Secretary of the powers he possessed under that statute. What Proclamation 3004 does *not* do, is to *give* the Secretary the power to prohibit travel to particular areas pursuant to the proclamation or to the border-control statutes. The Government's attempt to read this reservation of the Secretary's diplomatic function as an affirmative assertion of a national security criminal power is, of course, illogical.

The Secretary, in exercising his power to restrict passports, has never once relied upon a border-control statute. Not a single one of the restrictions upon travel involves such reliance, *supra* at 23-29. Indeed, the prohibition of travel to Cuba is explicitly based upon the Passport Act. As the Department's spokesman, Philip B. Heymann, Acting Administrator of the Bureau of Security and Consular Affairs, authoritatively stated recently, "In area restric-

tions we look only at foreign affairs and that is all we need them for, and that is all we use them for.[22]

The most obvious form of statutory implementation would have been to prosecute criminally the individuals who traveled to areas forbidden by the Secretary. The fact of such unauthorized travel on a large-scale basis to other countries is not a secret. It has been discussed by the State Department before a congressional committee;[23] it has been the subject of a report by the Commission on Government Security[24] and by congressional committees. In *United States* v. *Laub*, 253 F. Supp. 433, the court found that at least 600 persons engaged in such unauthorized travel since 1952.[25]

Yet, the defendants in the three recent Cuba travel cases are the first in this long period of widespread disregard of passport restrictions to be criminally prosecuted for such travel under the border-control statute. Even William Worthy was prosecuted only for his entry into the United States under Section 215, the entry provision of which was declared unconstitutional, *Worthy* v. *United States*, 328 F. 2d 386 (5th Cir. 1964).

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[22] *Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws*, Committee on the Judiciary, United States Senate on S. 3243, 89th Cong., 2d Sess., p. 61; see also p. 23.

[23] See, *e.g.*, *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957). pp. 23-24, 26, 30-31, 55, 71; *Hearings before the Senate Committee on Foreign Relations on Passport Legislation*, S. 2770, S. 3998, S. 4110, and S. 4137, 85th Cong., 2d Sess. (1958), pp. 38, 163, 196.

[24] *Report of the Commission on Government Security* published pursuant to Public Law 304, 84th Cong. (1957), p. 472.

[25] The Department reaffirmed this fact before the Internal Security Subcommittee, *supra* n. 22, p. 43, and submitted a schedule to that committee of the names of 282 people who traveled despite the so-called "restrictions" since January 1, 1963, *id.* at 62-66.

E. The Statute Must Be Literally and Narrowly Construed

The Government concedes that "Section 215(b) does not in so many many words prohibit violations of area restrictions" (Br. 11). It repeats that "Section 215(b) was not as explicit in prohibiting violations of area restrictions as it might be" (Br. 27). Given this admission, it is clear that the construction of the statute as being "broad enough to encompass departures for geographically restricted areas" (Br. 11) violates the rule that statutes must be narrowly construed where they are penal or where they might curtail a fundamental human liberty, *Kent* v. *Dulles, supra* at 129.

There is nothing ambiguous about this statute. Its use of the words "depart from and enter" necessarily refers to crossing the borders of the United States. But the proposed expansion to take into consideration what Congress "undoubtedly knew" (Br. 23), and what it "must have intended" (*ibid.*), violates, first, the canon of construction which places primary reliance upon the language employed by legislators, *United States* v. *American Trucking Association, supra;* second, the rule of narrow construction required of a criminal statute, *Commissioner* v. *Acker,* 361 U. S. 87, 91; *Smith* v. *United States,* 360 U. S. 1, 9; *F.C.C.* v. *American Broadcasting Co.,* 347 U. S. 284, 296, and, third, the pronouncement in *Kent* that "[w]here activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." *Kent* v. *Dulles, supra* at 129.

Finally, the Government's construction would lead to the most absurd results which in addition would not advance the claimed objective of area restrictions. First, Section 215 is obviously inapplicable to an American citizen residing in France who decides to go to Cuba since he would not be leaving the United States at all. Second, the citizen who intends upon his departure from the United

States to go to Cuba but changes his mind en route would be guilty of a violation of Section 215 since the crime is committed at the time of departure. These absurd results arise only if one adopts the Government's view that a statute making no mention of foreign destinations was intended to deal with that subject.

F. The Government Has Always Agreed With This Position Until it Embarked Upon the Current Criminal Prosecutions

The Government has never hitherto suggested that area restrictions are based upon Section 215 or its predecessor statutes, or that disregard of departmental strictures involves criminal sanctions under Section 215. The only statutes ever mentioned were two others dealing with ancillary matters, *i.e.*, the physical use of a passport, 18 U. S. C. § 1544,[26] and the use of foreign exchange in a restricted area, Trading with the Enemy Act, 50 App. U. S. C. § 1, et seq.[27] There is no occasion to determine here the applicability or validity of those two statutes.

In discussing the right to restrict passports against use in certain parts of the world the Solicitor General in *Kent* v. *Dulles, supra*, correctly pointed out: "But this restriction would carry no sanctions, since the statute now makes it unlawful only 'to depart from or enter' the country *without a lawful passport.*" [28]

The most authoritative study of the subject concluded:

> "The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omis-

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[26] *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies* (1957), *supra* n. 23 at p. 24.

[27] *Id.* at 55.

[28] Brief for respondent, *Kent and Briehl* v. *Dulles*, Oct. Term, 1957, No. 481, p. 56, n. 57 (italics the Government's).

sion if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case." Association of the Bar of the City of New York Report, *Freedom to Travel*, p. 70.[29]

G. Recognition of the Need for Legislation to Give the Desired Power

The lack of power has been repeatedly demonstrated by the vigorous efforts made in the executive and legislative branches of the government to secure legislation giving the Secretary the power to impose geographic restrictions upon travel. In 1957, the *Report of the Commission on Government Security* expressly recommended the amendment of 8 U.S.C. 1185 "to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid", S. Doc. 64, 84th Cong. (1957), 475.

Then, following the *Kent* decision, the President asked Congress for "clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives . . .", H. Doc. No. 417, 85th Cong., 2d Sess. This was not a routine request. It was made formally and explicitly because of the Court's decision in the *Kent* case. The President's request was embodied in a bill which was followed by numerous similar bills in the last six years.[30]

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[29] One of the authors of this study was the Hon. Adrian S. Fisher, former Legal Adviser to the Department of State.

[30] See, *e.g.*, 85th Cong., 1st Sess.: S. 2770, H.R. 8655; 85th Cong., 2d Sess.: S. 3344, 4030, 4110, H.R. 13005, 13318; 86th Cong., 1st Sess.: S. 1303, 2095, 2287, H.R. 2468, 5455, 7315, 8329, 8930, 9069; 87th Cong., 1st Sess.: H.R. 388, 935, 1086, 2485; 88th Cong., 1st Sess.: H.R. 2559, 8652.

The most recent departmental bill, H.R. 14895, 89th Cong., 2d Sess., "was prepared by the Department of State which had been studying it for 2 years", *Subcommittee Hearings on Internal Security Act, supra* at 50. This bill explicitly authorizes the Secretary to impose area restrictions and makes them criminally punishable. As Mr. Heymann has stated:

> "* * * What it does in the areas of territorial restrictions, in the areas of denial or revocation of a passport, is that it describes rather tightly, and limits very tightly, our power to control the travel of American citizens. It then makes enforceable the very tightly limited power that the Secretary is given." *Id.* at 73.

Senator Eastland introduced his own bill, S. 3243, 89th Cong., 2d Sess., which would amend Section 215 by adding a new section authorizing the Secretary of State, with the approval of the President, to impose area restrictions, the violation of which would be criminally punishable.[31]

As Mr. Justice Frankfurter has said, "* * * [t]his practical construction of the Act by those entrusted with its administration is reenforced by the [Administration's] unsuccessful attempt to secure from Congress an express grant of authority . . .", *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 352.

H. The Government's Present Explanation

Having previously been required to admit that the language of the statute does not support it and that the legislative history is likewise unsatisfactory, *supra* at 18, the Government then turns to denigration of the State Department officials' interpretation and administration of the

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[31] The Senator stated, "I became convinced that travel controls which the State Department has sought to impose to effectuate could not be enforced in the courts without a grant of legislative authority." *Id.* at 7.

Department's passport policy. It admits that the Department "has not called this application of Section 215(b) to public attention as much as it might have and State Department representatives have occasionally suggested that no criminal sanctions lie behind the Secretary's area restrictions" (Br. 8). It describes the Department's 1952 Press Release as "somewhat ambiguous", and it attacks the statements of departmental officials in congressional committee hearings as "plainly unsound" (Br. 30). It offers no explanation for the failure to prosecute the known 600 people who traveled to restricted areas and the probable hundreds of others who also engaged in such travel.

It is sufficient to note here that the departmental officials who testified in the numerous congressional committee hearings on this subject were either such important officials as Under-Secretary of State Murphy or others who, however, had the responsibility for carrying out the Department's policies. This is very different from the mere "affirmative disclaimers of agency power" (Br. 28) for which the Government cites *Federal Trade Commission* v. *Dean Foods Co.*, 384 U. S. 597. All that the Court did in *Dean* was to refuse to infer from the failure of Congress to act upon a commission's request for legislation "that Congress thereby expressed an intent to circumscribe traditional judicial remedies", *id.* at 610.

IV

The Government's construction of Section 215 would make it unconstitutional for vagueness and lack of legislative standards.

A. *Vagueness.* There is nothing vague about the language of Section 215, if given normal meaning. It requires a passport for departure from or entry into the United States and the passport must be a valid one, *i.e.*, one which by its terms has not expired, *supra* at 21. But

if one is to construe the statute as the Government does, *i.e.*, one which (i) imposes area restrictions, (ii) substitutes the term "validated" passport for "valid", and (iii) makes validity depend not upon the nature of the passport but the intended destination, then it is clearly unconstitutional for vagueness.

The use of terms so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law", *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; see also *Small* v. *American Sugar Refining Co.*, 267 U. S. 233, 238-240. The testimony of the departmental officials before the congressional committees, *supra* at 18, reveals their ignorance of the construction now sought to be imposed on the statute. If those experts did not know, how can this knowledge be ascribed to the average citizen? As Mr. Justice Holmes said, in declining to construe a criminal statute in a manner etymologically possible:

> "* * * it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle* v. *United States*, 283 U. S. 25, 27.

Restrictions upon travel involve the exercise of rights "necessary to the well-being of an American citizen", *Kent* v. *Dulles*, *supra* at 129, with "large social values", *id.* at 126, and "peripheral to the enjoyment of First Amendment guarantees", Mr. Justice Douglas, dissenting in *Zemel* v. *Rusk*, *supra* at 24. In such cases vagueness is especially pernicious, *Cantwell* v. *Connecticut*, 310 U. S. 296, 307; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290.

The Department has commendably admitted that Section 215, as construed by it, is "inadequate" because "it does not make clear that it is a crime to go into a restricted area".[32] It is precisely for that reason that the Department's representative referred to "the view long held by the executive and legislative branches that the existing enforcement provisions are not satisfactory."[33] The Department's conclusion was:

> "* * * we agree with the need to provide clear statutory authority for the imposition of necessary area restrictions and appropriate enforcement provisions."[34]

As was so well put by the Acting Administrator of the Bureau of Security and Consular Affairs:

> "In other words, right now we have broadly worded authority to do whatever we want, and very sloppy statutory powers to enforce what we do."[35]

This is hardly a description of a criminal statute meeting the due process and notice requirements of the Fifth and Sixth Amendments.

B. *Lack of legislative standards.* Given the normal meaning of language, the statute may present no serious question of standards. It makes a passport necessary for departure and control in the event of war or national emergency. But under the Government's construction, there is no guidance to the President or the Secretary as to when and why travel to particular countries should be prohibited upon pain of criminal sanctions. Indeed, we have seen in the confusing and confused testimony of the Department officials before congressional committees, *supra* at 12, 17, 35,

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[32] *Subcommittee Hearings on Internal Security Act, supra* at 43.

[33] *Id.* at 37, 47.

[34] *Id.* at 47.

[35] *Id.* at 73.

that there is a variety of considerations which leads them to restrict travel to particular areas and a variety of exceptions to those restrictions. Here, as this Court said in *Kent* v. *Dulles, supra* at 129, the regulation of travel must be based upon standards "adequate to pass scrutiny by the accepted tests."

The very language of Section 215 indicates that its extension to area restrictions is as lacking in congressional guidance as was its extension in *Kent* v. *Dulles, supra,* to political restrictions. The absence of standards here has also been recognized by the Department itself and by the legislation which it and others have proposed for the purpose of authorizing area restrictions. In the recent hearings, Senator Edward Kennedy pointed out to Mr. Philip B. Heymann, the Acting Administrator of the Bureau of security and Consular Affairs, that "a large and undefined law-making power in this area has been assumed by the Department of State."[36] This commendably candid response was made by Mr. Heymann:

> "As you know, the Secretary's authority to restrict travel has until now been exercised without any legislatively enacted standards and required procedures. One of the important purposes of the proposed State Department bill is to provide Congressional standards for the restriction of travel . . ."[37]

The absence of standards is highlighted by the fact that it is not the President, but administrative officials in the Department of State who impose this serious restriction on travel which is now sought to be enforced criminally. The statutory mandate that the Secretary "shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President", 5 U.S.C. § 156, must

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[36] *Subcommittee Hearings on Internal Security Act, supra* at 54.

[37] *Id.* at 55.

be read in context. That statute gives administrative authority to the Secretary; it does not authorize him to make determinations of policy, without any legislative guidance, determinative of the criminality of American citizens. As the Court said in *Greene* v. *McElroy*, 360 U. S. 474, 496:

> "* * * the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power; rather, it is whether either the President or Congress exercised such a power * * *."

This is in sharp contrast to the proposals made by both Senator Eastland and the Department of State. Under Senator Eastland's bill, the determination of the Secretary of State is expressly made "subject to the approval of the President" and the Secretary's regulations must be based upon findings of fact published by the Secretary "which provide the basis for such determinations, and to authorize, when necessary, such restrictions as the national interest, the protection of national security and the full, effective, and successful conduct of foreign affairs may require . . ." S. 3243, 89th Cong., 2d Sess.[38] H.R. 14895, the Department's bill, requires that the Secretary's actions be subject to the approval of the President.[39]

The interpretation of Section 215 by the court below avoids the constitutional problems just discussed. But the Government's new interpretation, made for this case, not only writes a new statute but leaves an administrator with no guidance as to its enforcement. Such an interpretation conflicts so violently with its language and its history before and after passage that it makes the statute constitutionally deficient by reason both of vagueness and lack of legislative standards.

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[38] *Id.* at 3.

[39] *Id.* at 82.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
Attorneys for Appellees.

October, 1966.

APPENDIX

Statutes, Proclamations, Executive Orders and Regulations

A. Border Control

1. Section 215 of the Immigration & Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, 8 U. S. C. § 1185 provides, in pertinent part, as follows:

Travel Control of Citizens and Aliens During War or National Emergency—Restrictions and Prohibitions on Aliens

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President, or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

CITIZENS

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

PENALTIES

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment or both; and any vehicle, vessel, or aircraft together with its appurtenances, equipment, *tackle, apparel and furniture, concerned in any such* violation, shall be forfeited to the United States.

DEFINITIONS

(d) The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

NONADMISSION OF CERTAIN ALIENS

(e) Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

REVOCATION OF PROCLAMATION AS AFFECTING PENALTIES

(f) The revocation of any proclamation, rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeiture, liability for which was incurred under this section prior to the revocation of such proclamation, rule, regulation, or order.

PERMITS TO ENTER

(g) Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

2. The pertinent portions of Presidential Proclamation No. 2914, Dec. 16, 1950, 64 Stat. A 454, are as follows:

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the

freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN

3. The pertinent portions of the Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C 31, "Control of Persons Leaving or Entering the United States By the President of the United States," are as follows:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United

States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

3. The entry of aliens into the Canal Zone and American Samoa shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 52.21 to 53.41, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regula-

tions as he may find the interests of the United States to require.

• • •

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

• • •

4. The pertinent portions of the regulations issued by the Secretary of State as found in Part 53 of Title 22 of the Code of Federal Regulations are:

Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency.

American Citizens and Nationals

§ 53.1 Definition of the term "United States". The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 Limitations upon travel. No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 Exceptions to regulations in § 53.2. No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam, or between any such places; or

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: Provided, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central or South America or any island adjacent thereto: And provided also, That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman: Provided, That the person is in possession of a specially validated United States merchant mariner's document issued by the United States Coast Guard; or

• • •

(h) When specifically authorized by the Secretary of State through appropriate official channels, to depart from or enter the United States, as defined in § 53.1. The fee for granting an exception under this subsection is $25.

• • •

§ 53.5 Prevention of departure from or entry into the United States. • • •

§ 53.6 Attempt of a citizen or national to enter without a valid passport. • • •

• • •

§ 53.8 Discretional exercise of authority in passport matters. Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

3. Public Notice 179, 26 F.R. 492, promulgated on January 16, 1961 provides:

Department of State

[Public Notice 179]

United States Citizens
Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

Loy Henderson
Deputy Under Secretary for
Administration

4. Press Release No. 24 issued by the Secretary of State on January 16, 1961, provides:

Press Release No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

B. Area Restrictions

1. The Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U.S.C. 211a provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. The pertinent portions of Executive Order No. 7856 of 1938, March 31, 1938, 3 F.R. 799, as found in Part 51 of Title 22 of the Code of Federal Regulations, are as follows:

§ 51.75 Refusal to issue passport. The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

§ 51.76 Violation of passport restrictions. Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

§ 51.77 Secretary of State authorized to make passport regulations. The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 67

HELEN MAXINE LEVI TRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 176

UNITED STATES OF AMERICA, APPELLANT

v.

LEE LEVI LAUB, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court in No. 67 (TR. 94–100)[1] are reported at 241 F. Supp. 468, 472. The order of the district court dismissing the indictment

[1] "TR." represents the printed record in this Court in No. 67 and "LR." represents the record in No. 176.

in No. 176 (LR. 5–7) is unreported. The opinion of the district court in the related case of *United States* v. *Laub* (LR. 8–62) is reported at 253 F. Supp. 433. The opinion of the court of appeals in No. 67 (TR. 109–112) is reported at 353 F. 2d 506.

JURISDICTION

No. 67.—The judgment of the court of appeals (TR. 112) was entered on November 19, 1965, and a petition for rehearing was denied on January 4, 1966 (TR. 133). The petition for a writ of certiorari was filed on January 28, 1966, and was granted on April 18, 1966 (TR. 113; 384 U.S. 903). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

No. 176.—The district court's order dismissing the indictment was entered on May 5, 1966 (LR. 5–7). A notice of direct appeal to this Court was filed on May 20, 1966 (LR. 63), and this Court noted probable jurisdiction on June 13, 1966 (LR. 64; 384 U.S. 984). The jurisdiction of this Court rests upon 18 U.S.C. 3731 because the district court's dismissal of the indictment was "based upon the * * * construction of the statute upon which the indictment * * * is founded."

QUESTIONS PRESENTED

The questions presented in both cases are:

1. Whether violations of area restrictions upon international travel imposed by the Secretary of State are criminally punishable under Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b).

2. Whether Section 215(b), if so construed, is constitutional.

Additional questions presented in No. 67 are:

1. Whether Section 215(b) applies to travel to Cuba, although the provision was not expressly cited in the promulgating clause of the regulation imposing the restriction upon travel to that area.

2. Whether the President properly declared a state of national emergency justifying the imposition of area restrictions.

3. Whether petitioner violated Section 215(b) by leaving the United States for Mexico with the intention of traveling to Cuba if that country would admit her, and by thereafter traveling to Cuba.

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The statutes, proclamations, executive orders and regulations involved are set out in the Appendix, pp. 45–47, *infra*.

STATEMENT

Prior to 1961, no passport was required for travel in the Western Hemisphere, including Cuba. 22 Fed. Reg. 10836. On January 3, 1961, the United States broke diplomatic and consular relations with Cuba. Subsequently, citing the Passport Act of 1926 (22 U.S.C. 211a) and Executive Order 7856 (3 Fed. Reg. 799, 805–806), the Secretary of State on January 16, 1961, issued Public Notice 179 (26 F.R. 492) (pp. 55–56, *infra*), which declared all outstanding United States passports to be invalid for travel to or in Cuba "unless specifically endorsed for such travel under the authority of the Secretary of State." A

companion press release (Press Release No. 24; pp. 56–57, *infra*) stated that the Department of State contemplated granting exceptions to these travel restrictions for "persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests." On January 16, 1961, the Secretary issued Departmental Regulation 108.456 (26 Fed. Reg. 482) which, by amending 22 C.F.R. 53.3, excluded Cuba from the countries of North, Central and South America for which a valid passport is not required.

No. 67.—Petitioner was charged in a two-count indictment in the United States District Court for the Southern District of California with having willfully departed from the United States for Cuba via Mexico without a passport valid for Cuba, in violation of Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b) (TR. 1–2). Waiving trial by jury (TR. 48–49), she was tried on stipulated facts (TR. 49–52), and was convicted on both counts (TR. 101). She was sentenced to concurrent suspended six-month terms of imprisonment on each count and to pay a total fine of $1,000 (TR. 102–103). The court of appeals affirmed the conviction (TR. 109–112).

According to the stipulation, petitioner, an American citizen, obtained tourist permits to travel to Mexico in January and August 1962 (TR. 50, 51). On both occasions, she left the United States for Mexico (once by plane and once by automobile) with the intention of there seeking from the Cuban au-

thorities permission to travel to Cuba and of traveling from Mexico to Cuba if such permission were granted (*ibid.*). She did not then possess a passport specifically endorsed for travel to Cuba,[1] and she knew of 22 C.F.R. 53.3(b) (p. 54, *infra*), which then excluded Cuba from the areas of the Western Hemisphere for which no passport is required (TR. 51). On each occasion, some time after arriving in Mexico, petitioner applied to the Cuban authorities and received from them permission to enter Cuba. She then boarded a plane which left from the Central Airport in Mexico to Havana, Cuba (TR. 50–51). While in Cuba she traveled, observed and took photographs, and subsequently reported on her trips to various groups in the United States (TR. 51–52).

No. 176.—Appellees were charged in a one-count indictment filed in the United States District Court for the Eastern District of New York with conspiring to violate Section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185(b), by inducing, recruiting and arranging for the travel to Cuba of American citizens who did not possess passports

[1] The stipulation states only that "[a]t no time pertinent or material herein did defendant * * * bear a valid United States passport specifically endorsed for travel to the Republic of Cuba" (TR. 51). Hence the record is unclear as to whether petitioner had no passport at all, a revoked or expired passport, or a passport which was valid except for travel to restricted areas. The district court in the *Laub* case was advised informally by the judge in *Travis* that petitioner "did not have *any* unexpired passport when she made the two departures for Cuba" (LR. 24; emphasis in original). We have been advised that she possessed a *revoked* passport. See pp. 43–44, *infra*.

valid for travel to that country (LR. 1–2). The indictment alleged that it was part of the appellees' conspiracy to promote and solicit such unlawful travel by American citizens and to arrange for transportation to Cuba "by way of Europe" (LR. 2). In response to a motion for a bill of particulars, it was alleged that the individuals whose travel had been solicited possessed "unexpired and unrevoked United States passports which * * * had not been specifically validated by the Secretary of State for travel to Cuba" (LR. 4).

The district court granted appellees' motion to dismiss the indictment (LR. 5–7), incorporating into its judgment by reference its opinion in *United States* v. *Laub*, a companion case involving two of the appellees and two other defendants, who had been indicted on a similar charge relating to an earlier trip to Cuba (LR. 8–62). In that case, which had been tried before the same district judge without a jury, the court had acquitted the defendants on the ground that departures from the United States with unexpired and unrevoked passports do not violate Section 215(b) even if the departing individuals contemplate travel to an area upon which a restriction has been imposed by the Secretary of State (LR. 45).

SUMMARY OF ARGUMENT

I

A. In *Zemel* v. *Rusk*, 381 U.S. 1, this Court sustained the power of the Secretary of State to refuse to validate passports for travel to Cuba, but it reserved the question whether an individual who de-

parts the United States to engage in such travel violates Section 215(b) of the Immigration and Nationality Act of 1952. 381 U.S. at 18-20. The language of Section 215(b) is broad enough to cover such conduct. It requires every citizen who departs the United States during a national emergency to bear a "valid" passport. The "validity" of a passport turns not merely on whether it is unexpired and unrevoked; the statutory definition of the term "passport" indicates that Congress deemed validity "for * * * entry * * * into a foreign country" as an integral part of such a document. A passport which is invalid for the country to which the traveler is destined is, therefore, as defective under Section 215(b) as an expired or revoked passport.

The district court in *Laub* erroneously assumed that Section 215(b) was merely a "border control" measure. In fact, it is quite clear that in carving out exemptions to the prohibitions of Section 215(b), the Executive has distinguished among travelers on the basis of the countries to which they are traveling. Hence the statute cannot be read as a mere "departure and entry" provision.

B. The legislative history of Section 215(b) must be read in light of the Department of State's wartime passport practices because the Congresses which enacted such legislation during the World Wars were expressly providing wartime measures only. During World War I, the Department of State validated passports only "for specific countries and for specific purposes." Section 215(b)'s command that a "valid" passport be possessed by any citizen leaving

the United States in time of war or national emergency—which was copied from similar statutes passed in 1918 and 1941—must be read as referring to that practice. In light of that practice, Congress could not have been intending in 1918 and 1941 to permit departures for geographic areas other than those for which travelers' passports were specifically validated.

To be sure, the Department of State has not called this application of Section 215(b) to public attention as much as it might have, and State Department representatives have occasionally suggested that no criminal sanctions lie behind the Secretary's area restrictions. Neither these statements—many of which are ambiguous—nor the various unsuccessful attempts to enact legislation dealing more specifically with this problem than does Section 215(b) are, however, determinative of the issue of statutory construction presently before the Court. See *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. The Department of State's recent view is clearly expressed in the endorsement on passports which warns travelers that if they go to a geographically restricted area, they "may be liable for prosecution under Section [215]."

C. The defendants in these cases cannot complain that they were not given ample warning. They knew that travel to Cuba would violate a condition of their passports and that the possession of a "valid" passport was a condition of departure. This is not a case in which conduct which might have been thought to be totally innocent has been subjected to criminal punishment.

II

A. This Court's rejection of the constitutional arguments made in *Zemel* v. *Rusk*, 381 U.S. 1, notwithstanding its recognition that refusal to validate passports for travel to Cuba deters travel to that area, is a complete answer to the First and Fifth Amendment challenges made by the defendants in these cases. Having held that a restriction upon foreign travel is an inhibition upon action and not upon speech, this Court should reject the claim made by petitioner Travis that the power to permit travel to Cuba confers a censor's discretion upon the Secretary of State.

B. The excessive delegation argument was similarly made and rejected in *Zemel*. The Executive has necessarily been granted broad discretion in the area of foreign relations because of the volatile nature of international relations. Congress created the crime—departure without a valid passport—and left to the Secretary only the standards of validity. There is, consequently, no substance to the claim that the Executive has been given the power to determine what conduct will be criminal.

III

Section 215(b) applies even though that provision was not cited in the promulgating clause of the "Excluding Cuba" regulation. The defendants were charged with violating the statute, not the regulation; hence there is no need to find a specific reference in the regulation to the authority conferred by the statute. Moreover, Section 215 is cited in the official reporter of governmental regulations.

IV

The presidential proclamations which are the "triggers" for Section 215 are still in effect and their basis is not a subject for judicial examination. The statute confers only on the Executive and on Congress the power to repeal the state of national emergency which brings into play the restrictions of Section 215.

V

Petitioner Travis departed the United States with the intention of traveling to Cuba if that country would admit her. Area restrictions would be meaningless if her subsequent entry into Cuba were not deemed criminal simply because it was not certain at the time of her departure that Cuba would permit her to enter.

ARGUMENT

I

AMERICAN CITIZENS WHO LEAVE THE UNITED STATES DURING A NATIONAL EMERGENCY BOUND FOR A DESTINATION WITH RESPECT TO WHICH THEIR PASSPORTS ARE INVALID VIOLATE SECTION 215(b) OF THE IMMIGRATION AND NATIONALITY ACT

In *Zemel* v. *Rusk*, 381 U.S. 1, this Court sustained the power of the Secretary of State to impose area restrictions upon travel abroad by American citizens. The Court held that the power had been conferred by the Passport Act of 1926, 22 U.S.C. 211(a), which generally authorized the Secretary of State to "grant and issue passports * * * under such rules as the President shall designate and prescribe * * *." While noting that neither the legislative history nor

the language of the 1926 Act expressly manifests an intention to authorize area restrictions, the Court held that the breadth of the statutory language and the Executive's consistent practice—well known to Congress—of imposing such restrictions during periods of national emergency warranted the conclusion that Congress "intended in 1926 to maintain in the Executive the authority to make such restrictions." 381 U.S. at 9. Our contention that Section 215(b) subjects to criminal penalties any American citizen who departs the United States for an immediate or ultimate destination with respect to which his passport is invalid rests on much the same considerations.

Section 215(b) does not, in so many words, prohibit violations of area restrictions; it speaks, as the district court noted in the *Laub* case (L.R. 42), in the language of "border control statutes regulating departure from and entry into the United States." But, for reasons explained below, we believe that, as in *Zemel*, the text is broad enough to encompass departures for geographically restricted areas, and the consistent practice known to Congress when Section 215(b) and its predecessor were enacted renders it unlikely that Congress intended to leave the large gap in enforcement of area restrictions which would result from the decision of the district court in *Laub*.[1]

[1] We take as our premise and do not repeat here the history of the Cuban threat to the security of the Western Hemisphere and of area restrictions in general which are discussed in great detail in our brief in *Zemel* v. *Rusk*, No. 86, O.T. 1964, pp. 21–66. On the basis of that material, the Court concluded in *Zemel* that the restriction upon travel to Cuba was "supported by the weightiest considerations of national security." 381 U.S. at 16.

232-642—66——3

A. THE LANGUAGE OF SECTION 215(b) IS BROAD ENOUGH TO COVER VIOLATIONS OF AREA RESTRICTIONS

Section 215(b) declares it unlawful, in times of war or national emergency, for any citizen of the United States "to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." On its face, the statute requires not only that the traveler possess a passport when he departs, but that the passport be a "valid" one. The district court in *Laub* construed the adjective "valid" as relating only to whether the passport has been revoked or has expired. In so doing, the court overlooked a third element—*i.e.*, whether the passport has been validated for the traveler's intended destination. Our position, stated succinctly, is that a passport's "validity" within the meaning of Section 215(b) does not alone depend on its status as unexpired and unrevoked; it is "valid" only for such travel as the Secretary of State authorizes. Having the power to issue passports, the Secretary also has the necessarily included power of imposing conditions and limitations upon the validity of such documents. No one would argue that the Secretary may not fix a period of years less than the statutory maximum (22 U.S.C. 217a) for which a passport is to be valid. Anyone then departing with an out-of-date passport has clearly violated Section 215(b). The same result obtains, we submit, when the passport is invalid on another ground. Thus, today, when passports are declared "invalid" until the bearer signs on a designated line, departure with an unsigned passport likewise violates the statute. Similarly, we submit, Section 215(b) would

apply to a citizen who left the country in violation of a restriction on departures by certain kinds of vehicles—assuming these were a rational and permissible basis for such a restriction. In sum, any condition of validity which the Secretary imposes is as much an element of a passport's "validity" for purposes of Section 215(b) as the passport's expiration date.

1. Indeed, the condition which these cases involve—a limitation upon the foreign states to which the passport is addressed—is related in a much more fundamental sense to the essential nature of a passport than technical conditions such as an expiration date. "Passport" is defined in Section 101(30) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(30), as follows (emphasis added):

> The term "passport" means any travel document issued by competent authority showing the bearer's origin identity, and nationality if any, *which is valid for the entry of the bearer into a foreign country.*

The concluding language of the above definition demonstrates that a "travel document" which otherwise appears to be a passport is not a passport in the statutory sense until it is validated "for entry * * * into a foreign country." This Court observed in *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699, that a passport "is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely * * *." If a traveler is destined for a foreign country with a passport which is not "addressed" to the government of that country,

he is traveling with no passport at all. For, as the Department of State observed in a 1957 response to a Senate committee, a passport "is always a request to another government for safe conduct of the bearer." *Hearings Before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957), p. 59. In the same response, the Department noted its position that an endorsement on a passport reading "'Not valid to go to country X' * * * means that as far as the United States is concerned, the passport is not valid for use in travel to country X." *Ibid.*

To be sure, as this Court observed in *Kent* v. *Dulles*, 357 U.S. 116, 129, the age-old function of a passport is presently its subordinate role; "[i]ts crucial function today is control over exit." But whether it suffices as a document controlling exit is not the complete test of a passport's validity. The statute defines passport as a document "valid for the entry of the bearer into a foreign country" not as one "valid for the departure of the bearer from the United States." This choice of language must mean that a passport does not meet the statutory conditions unless, so far as the Secretary of State has the power to do so, he has authorized the bearer not only to depart the United States but to enter the country to which he is destined.

Nor can the words "entry * * * into a foreign country" be read as meaning "entry * * * into *any* foreign country," thereby validating for purposes of departure under Section 215(b) a travel document which authorizes entry into a foreign country other than that to which the traveler is destined. A docu-

ment authorizing entry into country *X* and thereby addressed to the government of *X* is hardly of use to a traveler destined for *Y*. It does, of course, inferentially authorize him to leave the United States, but it does not, in any meaningful sense, authorize entry. Having determined that a necessary constituent of a passport be that it "is valid for * * * entry," Congress could not rationally have intended that a validation for any entry whatever—even if it be to a country in which the traveler has no prospect of setting foot—satisfies this requirement. We submit that Section 101(30) must be read as meaning that an authorizing travel document qualifies as a "passport" only if it is valid for entry into the foreign country or countries to which the traveler is destined. It follows, then, that the prohibition in Section 215(b) against departures without "valid" passports bars departures with passports which are invalid for the foreign country to which the traveler is destined.

This conclusion is further supported by the obvious gap which affirmance of the judgment in *Laub* would leave in the implementation of the important foreign policy considerations which underlie area restrictions. For if Section 215(b) does not make travel to Cuba criminal, there is no real way to prevent the entry into Cuba of individual citizens, who may have no baser motive than curiosity but who can thereby "involve the Nation in dangerous international incidents." *Zemel* v. *Rusk*, 381 U.S. 1, 15. The provisions in the Criminal Code relating to misuse of passports (18 U.S.C. 1541–1546), particularly Section

1544, which prohibits use of a passport "in violation of the conditions or restrictions therein contained," would not appear to apply when, as is usually the case, entry into the prohibited area is accomplished without "use" of the passport. There is no indication, in other words, that petitioner Travis exhibited or otherwise "used" her passport in gaining entry to Cuba. And the provision governing the making of false statements in an application for a passport would plainly not apply if no application were made (*i.e.*, if a passport previously issued for another trip were used for travel to Cuba) or if the application listed only other foreign countries which the traveler intended to visit.

The construction of Section 215(b) which the district court and court of appeals adopted in the *Travis* case and which we urge here was also adopted by the Court of Appeals for the Fifth Circuit in *Worthy* v. *United States*, 328 F. 2d 386. While the court there reversed a conviction under Section 215(b) for having unlawfully entered the United States,[4] it noted (328 F. 2d at 391; emphasis added):

> The appellant puts forward the proposition that the intent and purpose of the Congress was to make criminal clandestine departures from or

[4] Worthy, a newsman, traveled to Cuba without a passport. He was indicted for and convicted of a violation of section 215(b) in that he *entered* the United States without a valid passport. The Court held that the entry provision of the statute was unconstitutional because it deprived a citizen of his "inherent" right to reenter his own country. No such constitutional inhibition exists on the prohibition of departure without a valid passport. The court of appeals noted that it would have had a different case under the provision of the statute prohibiting departure, 328 F. 2d at 393.

> entries to the United States, and because there was no attempt to conceal his entry, the act did not apply to him. The statute was enacted, beyond doubt, for the purpose stated by the appellant, but it reached much further. *It was the clear intent of the statute to require passports for foreign travel, with some exceptions, to permit reasonable restrictions to be placed upon foreign travel, and to impose criminal penalties for willful violations.* * * *

The position we take here was also approved by the district court in *MacEwan* v. *Rusk*, 228 F. Supp. 306, 310 (E.D. Pa.), affirmed, 344 F. 2d 963 (C.A. 3), which reasoned:

> If the statute is broad enough to prohibit the departure of a citizen from the United States without a valid passport, it is difficult to see why a partial barrier is not within the statute. If departure may be entirely prohibited, then surely departure may be permitted except to restricted areas, on the familiar principle that the greater necessarily includes the lesser power. * * *

And in *United States* v. *Healy*, 376 U.S. 75, 83, n. 7, this Court assumed, in passing, that Section 215 applied to the restriction upon travel to Cuba.[4]

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[4] Appellees had been indicted for forcing the pilot of a private plane to fly them from Florida to Cuba. The court said: However, it may be observed that a trip to Cuba would have been lawful only if appellees had had passports specifically endorsed for travel to Cuba. See Presidential Proclamations No. 2914, Dec. 16, 1950 (64 Stat. A454); and No. 3004, Jan. 17, 1953 (67 Stat. C31); § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185; Department of State Public Notice 179, 26 Fed. Reg. 492, Jan. 16, 1961.

2. The principal error of the district court in *Laub* and of the petitioner in *Travis* (see Travis Br. 11, 20, 23, 25, 35) is their assertion that Section 215(b) is merely a "departure and entry" or "border control" statute and was not intended to regulate the destination of American citizens traveling abroad (LR. 35–37, 41, 45). The most persuasive evidence that Section 215(b) is and always was considered a statute authorizing limitations upon travelers' destinations is the consistent administration of the "exception" proviso of Section 215(b). The statute declares unlawful departures without a valid passport "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe" (p. 47, *infra*). If Section 215(b) were merely a "departure and entry" provision and were not concerned with the destinations of those leaving the United States, it would plainly be out of keeping with the statute's tenor to issue exceptions which depend upon where a traveler is headed. Yet, as the district court noted in *Laub*, exceptions promulgated by the President shortly after the original version of the statute was enacted in 1918 fell into two categories: (1) "Military and naval personnel, as well as other classes of government personnel, were permitted to depart and enter without bearing valid passports"; (2) "Americans travelling between the United States and Canada, likewise, were not required to be the bearers of valid passports upon departure and entry (this exception was eventually expanded to include the entire Western Hemisphere)" (LR. 43). See 22 C.F.R. 53.3;

p. 54, *infra*. The first of these categories is, we agree, an exception to a "departure and entry" prohibition. The second, however, cannot be reconciled with the proposition that the statute was designed only as a form of "border control" (I.B. 43). It plainly distinguishes among travelers on the basis of their destinations. An individual without a passport who departs for a Central American country commits no offense; the same traveler destined for Europe violates Section 215(b).

The fact that the President may excuse travelers to Central America from the passport obligation of Section 215(b) does not *ipso facto* establish that the statute gives him the power to make certain destinations impermissible. But it does demonstrate that the statute accords the Executive the authority to reach beyond a travelers' bare departure from the United States and to impose obligations dependent upon the countries to which he is destined. For example, the regulation which exempts travelers in the Western Hemisphere from the passport requirement contains a proviso which makes the exemption inapplicable if the Western Hemisphere country is merely a way-station on a trip to a place for which a valid passport is required. 22 C.F.R. 53.3(b); p. 54, *infra*. That proviso is clearly a permissible exercise of the power which Section 215(b) confers on the President to issue "such limitations and exceptions as [he] may authorize and prescribe" (p. 47, *infra*). The "limitations and exceptions" power may, we submit, as readily be exercised to incorporate into the "validity" of a passport the power conferred on the Secretary

of State to impose area restrictions—which was upheld by this Court in *Zemel* v. *Rusk*, 381 U.S. 1—as to exempt other geographical areas entirely from the passport requirement—a power nowhere specifically delegated to any Executive official. Since, as we have shown, Congress did not intend to deny the President the power to make the criminal sanctions of Section 215(b) contingent upon a traveler's destination, those sanctions apply when, as here, the travelers departed from the United States destined for a country to which their passports had been endorsed as "not valid."

B. THE LEGISLATIVE HISTORY AND ADMINISTRATIVE INTERPRETATION OF SECTION 215(b) ARE CONSISTENT WITH ITS APPLICATION TO VIOLATIONS OF AREA RESTRICTIONS

We agree with the district court in *Laub* (LR. 42) and with petitioner in *Travis* (Travis Br. 22–24) that the most pertinent legislative history is that of the passage of the Act of May 22, 1918, 40 Stat. 559, since it was that statute which was substantially reenacted in 1941 (55 Stat. 252) and as Section 215 of the Immigration and Nationality Act of 1952. The House and Senate reports pertaining to the bill which became the 1918 Act are meager, and they do not address themselves to the question whether the statute was to be deemed violated by those who traveled from the United States contrary to area restrictions. See H. Rep. No. 485, 65th Cong., 2d Sess. (1918); S. Rep. No. 431, 65th Cong., 2d Sess. (1918). Nor do the debates on the floor of either chamber show any awareness of this problem by the sponsors of the legislation or those who questioned them. See 56

Cong. Rec. 6029–6032, 6061–6068 (House), 6191–6195, 6246–6248 (Senate). The district court drew from this silence the inference that Congress was not then concerned with *where* departing citizens traveled, but only with *whether* they were permitted to depart. But that conclusion overlooks the Department of State's then outstanding passport policies. For the reasons stated below, we believe that the 1918 legislation, *construed in light of what Congress then knew regarding wartime passport policies*, was intended to subject to criminal sanctions any person who departed in violation of a geographical restriction in his passport.

The 1918 Act was passed as a war measure (see 56 Cong. Rec. 6030, 6191);* indeed, unlike Section 215(b), it was expressly applicable only "when the United States is at war" (40 Stat. 559). It was the subject of unpublished hearings before the House Committee on Foreign Affairs (56 Cong. Rec. 6030), and among the witnesses testifying in support of the legislation at the hearings were the Acting Secretary of State, the Counsellor of the Department of State and the Chief of the Bureau of Passports. 56 Cong. Rec. 6031. After hearing their testimony, it is hardly probable that the House Committee and, through it, the Congress itself, were unaware of the wartime passport policy of the Department of State, summarized in a 1957 response to questions from the Sen-

* The Chairman of the House Committee on Foreign Affairs (Rep. Flood) was asked (56 Cong. Rec. 6030):

> Mr. Moore of Pennsylvania. The gentleman advances this as a war measure and puts it on that ground?
>
> Mr. Flood. Absolutely. It is limited to the duration of the war.

ate Committee on Foreign Relations (*Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies*, 85th Cong., 1st Sess. (1957), pp. 63–64):

> For some years prior to the outbreak of World War I, passports were valid for all countries. Beginning December 9, 1914, passports were made valid for specific countries and for specific purposes. This practice continued throughout the war. * * *
>
> In other words, a passport issued during World War I was not, like the analogous document issued today, a general authorization to travel with enumerated exceptions. It was, instead, issued "for specific countries and for specific purposes," and was valid only for the limited travel endorsed thereon.
>
> The Congress which passed the Act of 1918 doubtless knew of this wartime form of passport. Having enacted a statute which made a "valid passport" a necessary condition of wartime departure from the United States, Congress could not, we submit, have

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With the outbreak of World War I, the following endorsement was placed on passports which were issued or submitted for renewal (9 Am. J. Int'l L. (Spec. Supp. 1915) 383):

> The person to whom this passport is issued has declared under oath that he desires it for use in visiting the countries hereinafter named, for the following objects:
>
> (Name of country.) (Object of visit.)
>
> (Name of country.) (Object of visit.)
>
> (Name of country.) (Object of visit.)
>
> This passport is not valid for use in other countries except for necessary transit to or from the countries named, unless amended by an American diplomatic or principal consular officer.

intended to leave the gap which the district court in *Laub* believed had been left—*i.e.*, to impose no criminal penalty upon individuals leaving from the United States for destinations other than those for which their passports had been endorsed. What Congress must have intended was to close the country's borders altogether except to the extent travel was specifically authorized by an appropriate governmental agency. Any citizen departing without a "valid passport"—*i.e.*, without any passport at all or without a passport endorsed for his destination—was subject to criminal sanctions.

The Act of 1918, in other words, imposed the existing State Department policies regarding passports on any citizen planning to depart from or enter the country. It was then standard practice, of several years' standing, to limit all passports for travel to defined areas. That practice must have been what Congress had in mind when it prescribed a "valid passport" as a condition of departure. The statute was intended, we submit, to make it unlawful to travel to areas for which the State Department refused to issue a passport. The effect was not limited to enemy territory, for in 1919 the Department refused to issue passports for "unnecessary" travel to Europe. The Department explained (3 Hackworth, *Digest of International Law* (1942), p. 530):

> The passport restrictions are maintained first because the Department deems it inadvisable in general to allow unnecessary travel between this country and Europe before peace has been declared, and second, because of conditions in Europe, particularly in the shortage of food

and overtaxing of transportation and other services.

The 1918 statute lapsed, by its own terms, with the end of the war, and the passport-bearing requirement was not reenacted into law until World War II. In the interim, the Department of State had imposed area restrictions upon Ethiopia, China and Spain. And, with the beginning of hostilities in Europe, the Department of State again required (except for travel in the Western Hemisphere) that passports "set forth the specific countries to be visited and the purpose of the travel." *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies,* 85th Cong., 1st Sess. (1957), p. 64. See Department Order No. 811, 4 Fed. Reg. 3892. Against that background, Congress in 1941 substantially reenacted the 1918 statute, again prescribing a "valid passport"—which meant, in light of the existing practice, one that set forth the specific countries to be visited and the purpose of the travel"—as a condition of departure. (Act of June 21, 1941, 55 Stat. 252.) Some indication of the meaning ascribed to the 1941 legislation emerges from the President's subsequent issuance of regulations listing the exceptions to the 1941 act, which stated, as does the present 22 C.F.R. 53.8 (p. 55, *infra*), that (6 Fed. Reg. 6070):

> Nothing in these rules and regulations shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the

purpose of restricting its validity or use in certain countries.

The 1952 statute has, as the district court noted in *Laub*, "no independent legislative history" (L.R. 42). But relevant in determining Congress' understanding of the term "valid passport" is the fact that area restrictions had been imposed on travel to Hungary and Czechoslovakia in 1951 and that in May 1952—one month before the enactment of the Immigration and Nationality Act of 1952—the Department of State announced that thereafter all passports would be stamped (State Department Press Release No. 341, May 1, 1952, 26 Dept. of State Bull. 736):

> This passport is not valid for travel to Albania, Bulgaria, China, Czechoslovakia, Hungary, Poland, Rumania, or the Union of Soviet Socialist Republics unless specifically endorsed under authority of the Department of State as being valid for such travel.

Our argument with respect to the history of these acts rests, therefore, not on what legislative reports or debates expressly say. It is founded rather on the premises from which Congress must have proceeded when it passed the statutes of 1918, 1941 and 1952. On each occasion, the Department of State's passport policy was geographically restrictive: a passport was "valid" only for certain destinations. In enacting Section 215(b) and its predecessors Congress must, we believe, have incorporated this standard of validity into the statute.

The district court in *Laub* placed substantial reliance on the fact that Section 215(b) does not ex-

pressly prohibit travel to proscribed areas as well as * * * prohibit departure and entry" (LR. 11). But the fact that Congress framed the statute in general terms, thereby incorporating whatever permissible standards of validity the Secretary of State might deem it prudent to impose, does not mean that it intended to withhold the power to impose area restrictions. The general purpose of the statute was, we believe, to subject departures from this country to stricter controls in a variety of ways, among which were the regulation of travelers' destinations. A more specific enumeration of that particular restriction might have been construed (under the maxim *inclusio unius exclusio alterius*) as intended to deprive the Secretary of the power to impose other kinds of conditions.

Moreover, Congress may well have been reluctant to subject to criminal punishment within the United States the bare act of "travel to proscribed areas" because that would appear to be extraterritorial legislation. The criminal act would, under such a statute, consist of no more than the crossing of a foreign border. By framing Section 215(b) as it did, Congress subjected to criminal sanctions the act of departing the United States with specific intent to enter a prohibited area. The fact that the realization of that intent—*i.e.*, the crossing of the foreign border—may also be an essential element of that offense does not render the present statute extraterritorial. The offense defined by Section 215(b) hinges on the validity of the passport; whether or not the passport is valid depends upon the destina-

tion to which the traveler actually goes. If he never enters a restricted area he has not, irrespective of his state of mind, departed without a valid passport. The departure is the nub of the offense. The entry into the restricted area is a term of condition subsequent, just as, for example, the commission of an overt act would be under the federal conspiracy statute, 18 U.S.C. 371.

Nor are the petitioner in *Travis* (Travis Br. 32-35) and the district court in *Laub* (LBR. 38-41) correct in relying on the failure of the Congress to enact proposed legislation to make the violation of area restrictions a crime. Because Section 215(b) was not as explicit in prohibiting violations of area restrictions as it might be, the President and the Department of State have repeatedly sought to put the matter beyond dispute. That is common practice. As the Court recently noted in *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 610, "[p]ublic policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations" (quoting from *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47). But, as the Court there concluded, "requests by government agencies and the resulting nonaction of the Congress [should not be construed] as affirmative evidence of no authority." 384 U.S. at 610. See also, *United States* v. *du Pont & Co.*, 353 U.S. 586, 590; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-349.

It is true that press releases of the Department of State issued in 1919 and 1952 when travel restrictions were imposed did not suggest that Section 215(b) was

applicable or that criminal sanctions might be invoked if area restrictions were violated. See LR. 35–36; Travis Br. 26–27; 3 Hackworth, *Digest of International Law* (1942), p. 530; 26 Dept. of State Bull. 736. But these omissions by the agency charged with administration of the passport provisions are far less substantial than the numerous affirmative disclaimers of agency power which this Court deemed unpersuasive in *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 636–640 (Appendix to dissenting opinion).[8]

The 1952 press release is, moreover, somewhat ambiguous. After announcing that passports would be stamped not valid for travel in Iron Curtain countries, the release said (Press Release No. 341, 26 Dept. of State Bull. 736):

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[8] Petitioner Travis also relies on the Department of State's 1957 response to the Senate Committee on Foreign Relations in which it advised the Committee that the endorsement of an area restriction on a passport "does not necessarily mean that if the bearer travels to country *X* he will be violating the criminal law" (Travis Br. 30–32). The statement is not inconsistent with our present position for two reasons: *First*, Section 215(b) applies only in times of war or national emergency, while the authority to make the restrictive endorsement is not so limited. Compare Section 211a of the Passport Act of 1926, 22 U.S.C. 211a. Consequently, the Department was right in responding that travel in violation of an area restriction is not "necessarily" a violation of the criminal law; it is no violation if there is no national emergency in effect. *Second*, the bearer of a passport with a restrictive endorsement may travel to "country *X*" and not be violating the criminal law if he forms the intention of going there after he has left the United States. It is only if his intended destination when he leaves is country *X* that he can be criminally prosecuted under Section 215(b) if he subsequently enters that country.

> In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas. It contemplates that American citizens will consult the Department or the Consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized.

If the first sentence of this paragraph stood alone it would be fair to conclude that there is no criminal sanction for travel to areas upon which passport restrictions have been imposed. But we submit that the second sentence casts an entirely different meaning upon the whole paragraph, which may be fairly read as saying the following: "By imposing area restrictions the Department is not absolutely prohibiting travel to these areas. If the dangers of travel in these areas are reduced at any particular time or in the case of any particular person, permission to travel will be granted." Such a reading does not, of course, conflict with the view we take here—that departure in violation of area restrictions is forbidden under pain of criminal sanctions.

Irrespective of the implications of its press release, the Department of State generally took the position in Congressional hearings that Section 215(b) applied to departures in violation of area restrictions. See Testimony of Acting Director, Bureau of Security and Consular Affairs, in ***Hearings on the Right to Travel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,***

85th Cong., 1st Sess. (1957), pp. 88-91. The testimony of an earlier administrator of the same bureau, to which the district court referred in *Laub* (LR. 36-37), is plainly unsound and could not have reflected the considered view of the Department of State. That witness testified before a 1956 House committee that a traveler who wished to circumvent the passport requirement of Section 215(b) could leave the United States without a passport for a Western Hemisphere country and go from there to a European destination without violating any prohibition of American law. He said that "once they have left the United States, any inhibitions on travel abroad are not as a result of our laws, but the laws of other countries." *Hearings on the Immigration and Nationality Act before a Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess. (1956), Ser. 24, p. 4. This conclusion conflicts squarely with the regulations promulgated by the President pursuant to his power to issue exceptions to Section 215(b). For 22 C.F.R. 53.3(b) authorizes departures without a passport to Western Hemisphere countries *only* if they are the traveler's ultimate destination. The proviso in that subsection makes the exception inapplicable if the traveler's destination is "a place outside the United States for which a valid passport is required" (p. 54, *infra*). Hence it must be the Department of State's view that Section 215(b) is applicable—because no exception authorizes departure without a passport—if a traveler uses a Western Hemisphere country as a mere waystation for travel to some other destination.

The Department's view that Section 215(b) applies to departures for destinations which violate area restrictions has been expressed in an endorsement placed on passports since January 1961. Following the stamp which lists the countries upon which area restrictions have been imposed, the following notice appears (LR. 22):

> A Person Who Travels To Or In The Listed Countries Or Areas May Be Liable For Prosecution Under Section 1185, Title 8, U.S. Code, And Section 1544, Title 18, U.S. Code.

This warning, we submit, formally expresses the view of the Executive department regarding the applicability of Section 215(b) and it puts travelers such as the defendants in these cases on notice that criminal sanctions are prescribed for their violations of area restrictions.

C. THE STATUTE AND REGULATIONS PROVIDE FAIR WARNING THAT VIOLATIONS OF AREA RESTRICTIONS ARE CRIMINALLY PUNISHABLE

The district court in *Laub* supported its conclusion that Section 215(b) did not reach the conduct alleged in the indictment and bill of particulars by invoking the doctrine that criminal statutes should be strictly construed (LR. 41–42). Petitioner Travis makes the related contention that Section 215(b), even if read together with the applicable regulations, is unconstitutionally vague as applied here because it fails to notify travelers that violations of area restrictions are criminally punishable (Travis Br. 36–45). However the argument is phrased, it appears to us to raise essentially the question of fair warning which

this Court considered recently in *Bouie* v. *City of Columbia*, 378 U.S. 347. We submit that the defendants in these cases, unlike the petitioners in *Bouie*, had more than ample notice that their conduct was impermissible. They were not engaging in totally innocent conduct which, but for an unexpected construction of a criminal statute, would not be subject to any punitive measures whatever.

It was stipulated that petitioner Travis knew of the applicable regulations and of the provisions of Section 215(b) (TR. 51). The appellees in *Laub* may fairly be presumed, on the allegations of this indictment, to have known of the restrictions on travel to Cuba and of the endorsement on their passports advising them that prosecution under Section 215(b) was a possibility. (See also the facts of the related case, LR. 11–13.) The fact that the defendants may have disagreed with State Department officials and believed, as the district court did in *Laub*, that Section 215(b) did not make their conduct criminal does not mean that they were not given fair warning. For they plainly knew that their violations of area restrictions might result in the revocation of their passports. Consequently, they were not taken by surprise. These cases are, therefore, quite unlike *Raley* v. *Ohio*, 360 U.S. 423, and *Kraus & Bros.* v. *United States*, 327 U.S. 614, where those who were convicted of crime had no reason for believing that they were engaging in anything other than wholly lawful conduct.

II

SECTION 215(*b*) MAY CONSTITUTIONALLY BE APPLIED TO VIOLATIONS OF AREA RESTRICTIONS

A. THE PROHIBITION UPON TRAVEL TO DESIGNATED AREAS DOES NOT VIOLATE THE FIRST OR FIFTH AMENDMENT

The basic constitutional issue was resolved by *Zemel* v. *Rusk*, 381 U.S. 1, in which this Court noted that the governmental power there being challenged—*i.e.*, the Secretary of State's refusal to validate a passport for a given geographic area—"acts as a deterrent to travel to that area." 381 U.S. at 14. The Court held that it was constitutionally permissible to impose governmental restrictions of this kind upon the "liberty" of travel protected by the Fifth Amendment because such restrictions rest upon "the weightiest considerations of national security." 381 U.S. at 14–16. The Court also held that no First Amendment right was at issue because the inhibition on travel to Cuba (or other geographically restricted areas) "is an inhibition of action" (381 U.S. at 16) and not of speech. Those conclusions fully control this case and answer the First and Fifth Amendment challenges to Section 215(b)'s effective prohibition on travel to Cuba (Travis Br. 58–61).

There is no substance to petitioner Travis' claim that this case involves different questions under the First and Fifth Amendments because it imposes a criminal penalty, and does not merely authorize the withdrawal of governmental assurances of safe passage. So far as the First Amendment is concerned, this Court's conclusion in *Zemel* that no First

Amendment right is involved is as applicable to a criminal prohibition as to a civil inhibition. As for the Fifth Amendment claim, the considerations which led this court to conclude that travel to Cuba may be deterred in the interests of national security also support the conclusion that a criminal sanction is permissible. Indeed, there was no suggestion in *Zemel* that the absence of a criminal sanction in the statute there at issue affected the Court's determination of the constitutional claim. Compare, for example, *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402.

Petitioner Travis also attacks the Secretary's discretion to authorize travel to Cuba in individual cases on the ground that this confers on the Secretary a "censorial" power in the First Amendment area (Travis Br. 62–64). This contention is unsound. The Court held in *Zemel* that travel to a foreign country is not a right protected by the First Amendment; consequently, the Secretary is not licensing speech when he determines who may and who may not travel to Cuba. Nor is there any basis for assuming that the Secretary has used his discretion to inhibit free speech by granting permission only to those who express certain views. The authorization to endorse passports as valid for travel to Cuba is merely a recognition of the fact that, notwithstanding the general policy of deterring travel to that country, there may be instances when travel should be permitted. In the absence of any showing that the discretion is being abused, there is no constitutional flaw in the conferral of such power on the Secretary.

B. SECTION 215(b) DOES NOT IMPERMISSIBLY DELEGATE LEGISLATIVE POWER

Petitioner Travis argues that Section 215(b) is unconstitutional because it delegates broad legislative power to the Executive (Travis Br. 54–58). The basic delegation claim was fully answered by this Court in *Zemel* v. *Rusk*, 381 U.S. 1, 17–18, where a grant to the Executive of even more general statutory authority was deemed constitutionally permissible in the area of contemporary international relations because of its "changeable and explosive nature." 381 U.S. at 17. That consideration applies fully here. See, also, *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 109–110; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 324.

The claim that the broad authority which has always been thought permissible in the area of foreign relations is not appropriate when a criminal statute is involved (Travis Br. 54–55) is beside the point. For in this statute Congress did not delegate to the Secretary the power to *create* a crime. Congress defined the crime—departing the United States without a valid passport—and left to the Department of State the details concerning a passport's validity.

Nor is there substance to the claim that Section 215(b), unlike Section 211a of Passport Act of 1926, did not adopt the prior administrative practice as a standard by which to define the powers it delegated (Travis Br. 56–58). The statute involved in this case was enacted more than a quarter of a century after the provision construed in *Zemel*, and its "content" may also be taken "from history." 381 U.S. at 18.

To the extent, in other words, that Section 215(b) empowers the Executive to make "limitations and exceptions" and to the extent that it authorizes area restrictions, they must be of the same kind as those with which Congress was acquainted in 1952. Whether or not the Department of State had specifically focused on the imposition of criminal penalties for violations of area restrictions prior to 1952 is irrelevant. By requiring "valid" passports as a condition of departure Congress was empowering the Secretary of State to continue to impose such conditions and restrictions *upon the validity of* a passport as he had therefore imposed. And area restrictions were, as we have shown, among those with which Congress was well acquainted.

III

THE FAILURE TO CITE SECTION 215(b) IN THE PROMULGATING CLAUSE OF THE "EXCLUDING CUBA" REGULATION DID NOT MAKE THE STATUTE INAPPLICABLE

Petitioner Travis contends that she could not be criminally prosecuted for having traveled to Cuba because Section 215(b), the statute providing the criminal sanction, was not cited by the Secretary in the promulgating clause of the "Excluding Cuba" regulation. Petitioner's contention is that Section 215(c) authorizes criminal punishment only for the violation of the statute itself or of regulations issued "thereunder" (p. 47, *infra*). Since the "Excluding Cuba" regulation was allegedly not issued "under" Section 215, it is argued that travel to Cuba could not be a crime (Travis Br. 46–54). There are two answers to this argument.

First, petitioner errs in assuming that she was convicted of having violated a regulation. As her indictment demonstrates, she was accused of having violated the statute itself—Section 215(b)—by having departed the United States without a valid passport (TR. 1–2). Our theory is (pp. 11–15, *supra*) that one element of the passport's validity was whether travel to petitioner's destination had been authorized. Section 215 does not require that the Secretary expressly invoke that provision whenever he establishes standards by which passports are validated. If, for example, a citizen of the United States departs with an unsigned or expired passport or with one from which his photograph was missing, he would be violating the statute because his passport is invalid at the time of his departure. It would hardly be a defense to a prosecution under Section 215(b) that the Secretary did not invoke that statute when he made the traveler's signature a condition of a passport's validity.

A reading of the whole statute, including Section 215(a), demonstrates that when Section 215(c) speaks of violations of regulations it is referring not to the standards of validity which the Secretary prescribes but to the regulations under which aliens are permitted to enter and depart from the United States under Section 215(a)(1) (p. 46, *infra*). That clause delegates broad power to the Executive to establish the rules for such departure and entry, and it is for violation of these rules that Section 215(c)'s provision concerning "permit[s], rule[s], or regula-

tion[s] issued thereunder" provides a criminal sanction. This language is inapplicable to petitioner; the Secretary was not required, in other words, to act under the authority of Section 215 in establishing standards of validity for citizens' passports.

Second, even if petitioner's offense is viewed as a violation of a regulation which must, to be punishable under Section 215, be specifically promulgated under the authority of that section, there was sufficient reliance on Section 215 in the official notice of the "Excluding Cuba" regulation to make the statute applicable. As printed in the Federal Register (26 F.R. 482), the official reporter of governmental regulation, an express reference to "Sec. 215, 66 Stat. 190; 8 U.S.C. 1185 and Executive Order 3004" follows the text of the amended regulations. Reference is also made to Section 215 in the amended regulation as printed in 22 C.F.R. 53.3 (pocket supplement). That this reference appears in parentheses and smaller type is attributable to printing form and cannot be taken as proof that the Secretary of State did not rely on Section 215 in framing the regulation. The Rules of the Code of Federal Regulations specifically provide that this form should be followed in designating the authority for an individual section of the Code (1 C.F.R. xxvi):

> In general, each section of the Code is followed by a citation of statutory authority under which the section was issued * * * The authority for an individual section is designated by enclosure in parentheses at the end of the section.

The Code also makes this provision applicable to the printing of regulations in the Federal Register (1 C.F.R. (1965) 17.50):

> Authority covering a single section shall be cited in parentheses on a separate line immediately following the text of the section. * * *

Thus, although Section 215 does not appear in the public notice or press release issued by the Secretary of State, it is expressly set out in both official publications of government regulations.

IV

A STATE OF NATIONAL EMERGENCY HAD BEEN DECLARED AND IT EXISTED AT THE TIME OF PETITIONER TRAVIS' DEPARTURES

Section 215 applies, by its terms, only during a war or national emergency and after a finding and proclamation by the President "that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States * * *" (p. 45, *infra*). A national emergency was declared by the President on December 16, 1950 (Presidential Proclamation No. 2914, pp. 49-50, *infra*), and on January 17, 1953, the President issued Presidential Proclamation No. 3004, in which he found that additional restrictions and prohibitions upon the departure of persons from and entry into the United States was required by the national emergency (pp. 50-53, *infra*). The proclamation subjected the departure and entry of citizens to the regulations of the Secretary of

State, who was authorized "to revoke, modify or amend such regulations as he may find the interests of the United States to require" (pp. 52–53, *infra*).

There is no merit whatever to petitioner Travis' contention that the latter proclamation was inadequate because it failed specifically to advert to the need for geographic area restrictions (Travis Br. 65–66). As we have previously noted (p. 25, *supra*), area restrictions upon travel to eight Iron Curtain countries had been imposed in May 1952. When the proclamation of January 17, 1953 was issued, its reference to additional "restrictions and prohibitions" must have been intended to include the area limitations which had only recently been felt necessary as well as any other reasonable regulation the Secretary might impose. In any event, the statute did not require the President to enumerate in detail the kinds of restrictions he believed appropriate; the "trigger" which brings Section 215 into play is merely the finding and announcement that added restrictions are needed.

Petitioner Travis also contends that notwithstanding the President's failure to repeal either of the two proclamations and the statute's directive that its limitations apply "until otherwise ordered by the President or the Congress" (p. 46, *infra*), this Court should presently re-examine the basis for the finding of national emergency and determine that it no longer exists (Travis Br. 66–69). The statute, however, expressly confers authority to terminate the state of emergency (insofar as it relates to Section 215) only upon the President and Congress; the courts are as-

signed no role in that regard. Moreover, determinations such as these, involving an evaluation of the international political scene, have always been thought to be exclusively a matter for the Executive. See *United States* v. *Curtis-Wright Corp.*, 299 U.S. 304; *United States* v. *Belmont*, 301 U.S. 324; *United States* v. *Pink*, 315 U.S. 203; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103.*

V

PETITIONER TRAVIS VIOLATED SECTION 215(b) EVEN THOUGH SHE DID NOT OBTAIN CUBA'S PERMISSION TO ENTER THAT COUNTRY UNTIL AFTER HER DEPARTURES FROM THE UNITED STATES

There is, finally, no substance to petitioner Travis' contention that Section 215(b) did not apply to her departure because she did not, as of the moment when she crossed the border, have Cuba's consent to her entry into that country (Travis Br. 69–72). As we have indicated above (pp. 26–27, *supra*), we believe that Section 215(b) makes it a criminal offense to depart from the United States with the intention of traveling, either immediately or ultimately, to a destination to which one's passport is not valid, and thereafter to enter that foreign country. The traveler's

* We also note that the continued existence of the national emergency has been reaffirmed by Presidents since the Korean War. On November 29, 1960, President Eisenhower issued Executive Order No. 10896 (3 C.F.R. (1960 Supp.) 89) and on July 24, 1962, President Kennedy issued Executive Order No. 11037 (3 C.F.R. (1962 Supp.) 230). Both Orders refer to the continued existence of the national emergency proclaimed by President Truman in Proclamation 2914 of December 16, 1950.

practical obstacles or restrictions imposed by foreign law do not bear on this offense. If petitioner were able to avoid Section 215(b) on the ground that Cuba had not yet given its consent when she departed the United States, another traveler would similarly be able to claim that, as of the time of his departure, he did not yet possess the funds which enabled him to travel to Cuba (although he had every intention of earning them during his travels).[10] Obviously such circumstances are not a defense because the gravamen of the crime is departure with a specific intent—which petitioner concededly had (TR. 50–51). The subsequent entry into the foreign country may be an essential element, but how probable it was at the time of departure is no part of the offense.

The only authority cited to support petitioner's argument is *Heikkinen* v. *United States*, 355 U.S. 273. But in that case the Court holding that there can be no wilful *failure* to depart the United States until the country willing to receive the alien is identified. Petitioner erroneously attemps to draw from the *Heikkinen* case the negative inference that one cannot wilfully depart from the United States until a country has officially agreed to receive him. Wilful failure to depart and wilful departure are entirely

[10] Similarly, American citizens could resort to the same argument if they used Canada as a waystation for travel to Europe—to which a passport is required. It would be an obvious evasion of 22 C.F.R. 53.3(b) if a citizen could delay requesting a visa for a European country until he had arrived in Canada without a passport, and then contend that since he was unable to enter Europe without a visa until he arrived in Canada his departure—albeit with the necessary intent—was not a violation of Section 215(b).

different. One cannot wilfully fail to depart when he has nowhere to go, but he can wilfully depart, without a valid passport, regardless of whether the country of his destination has formally guaranteed acceptance prior to his departure.

We also note, with respect to petitioner Travis, that there is substantial doubt in the present state of the record whether she possessed any passport at all on her departures from the United States. The stipulation states only that she did not, at the pertinent times, "bear a valid United States passport specifically endorsed for travel to the Republic of Cuba" (TR. 51). It does not disclose whether she had an otherwise valid passport or whether she had none. The district judge in *Laub* said that he had been advised that she did not possess *any* unexpired passport (LR. 24), and we have been advised that she possessed a revoked passport (see note 2, *supra*, p. 5).

Whether petitioner possessed any passport at all is irrelevant to the principal issue presented by these cases since, if we are right, citizens who possess an otherwise valid passport which is invalid for Cuba are in no different posture with respect to departures for Cuba than citizens who possess no passport at all. But if the Court should disagree, it would not follow that departures for restricted areas are not punishable by Section 215(b) if the departing traveler bears no passport whatever. Petitioner was plainly no more privileged to travel to Havana without an unexpired and unrevoked passport then to travel to Paris. It is stipulated that she had knowledge of the "Excluding Cuba" regulation (TR. 51). Consequently, she

knew that Cuba was not one of the Western Hemisphere countries to which travel without a passport is permitted. Even if, contrary to our principal argument, she could not be criminally punished for violating the area restriction imposed on Cuba, she could be punished for leaving for that ultimate destination—for which the President provided no "exceptions"—without possessing an unrevoked or unexpired passport.

The stipulation is, as we have noted, unclear. In these circumstances, even if the Court were to agree with the district court in *Laub*, we believe it would be appropriate for the Travis case to be remanded under 28 U.S.C. 2106—either for further proceedings in which the meaning of the stipulation could be clarified or for a new trial on the indictment. *Bryan* v. *United States*, 338 U.S. 552.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in No. 67 should be affirmed and the judgment in No. 176 should be reversed and the case remanded for trial.

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SEPTEMBER 1966.

APPENDIX

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS AND REGULATIONS

The Act of July 3, 1926, § 1, 44 Stat. 887, 22 U.S.C. 211a, provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insural possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. 1185, provides, in pertinent part, as follows:

> TRAVEL CONTROL OF CITIZENS AND ALIENS DURING WAR OR NATIONAL EMERGENCY—RESTRICTIONS AND PROHIBITIONS ON ALIENS
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of per-

sons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence or permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

CITIZENS

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

PENALTIES

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment or both; and any vehicle, vessel, or aircraft together with its appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

DEFINITIONS

(d) The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

(e) Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

REVOCATION OF PROCLAMATION AS AFFECTING PENALTIES

(f) The revocation of any proclamation, rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeitures, liability for which was incurred under this section prior to the revocation of such proclamation, rule, regulation, or order.

PERMITS TO ENTER

(g) Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

Section 156 of 5 U.S.C. provides as follows:

Management of foreign affairs. The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the department, and he shall conduct the business

of the department in such manner as the President shall direct.

Executive Order No. 7856 of 1938, March 31, 1938, 3 Fed. Reg. 681, 22 C.F.R. 51.75–51.77, reads, in pertinent part, as follows:

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a pasport for the purpose of restricting its validity or use in certain countries.

§ 51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

§ 51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, provides, in pertinent part, as follows:

A Proclamation

Whereas recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

Whereas world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

* * * * * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a.m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, "Control of Persons Leaving or Entering the United States By the President of the United States," provides, in pertinent part, as follows:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163,

190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW THEREFORE, I HARRY S TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States, and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

3. The entry of aliens into the Canal Zone and American Samoa shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.21 to 53.41, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such

regulations as he may find the interests of the United States to require.

* * * * *

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

* * * * *

Sections 53.1–53.8 of 22 C.F.R. provide, in pertinent part, as follows:

"Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency

AMERICAN CITIZENS AND NATIONALS

§ 53.1 *Definition of the term "United States".* The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 *Limitations upon travel.* No citizen of the United States or person who owes alle-

giance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3

§ 53.3 *Exceptions to regulations in § 53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands and Guam, or between any such places; or

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also,* That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman: *Provided,* That the person is in possession of a specially validated United States merchant mariner's document issued by the United States Coast Guard; or

* * * * *

(h) When specifically authorized by the Secretary of State through appropriate official channels, to depart from or enter the United

States, as defined in § 53.1. The fee for granting an exception under this subsection is $25.

* * * * *

§ 53.5 *Prevention of departure from or entry into the United States.* * * *

§ 53.6 *Attempt of a citizen or national to enter without a valid passport.* * * *

* * * * *

§ 53.8 *Discretional exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

Public Notice 179, 26 Fed. Reg. 492, promulgated on January 16, 1961, provides:

"DEPARTMENT OF STATE

[Public Notice 179]

United States Citizens

Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in

Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for Administration."

Press Release No. 24, issued by the Secretary of State on January 16, 1961, provides:

PRESS RELEASE NO. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

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SUPREME COURT OF THE UNITED STATES

No. 176.—October Term, 1966.

United States, Appellant, v. Lee Levi Laub et al. | On Appeal From the United States District Court for the Eastern District of New York.

[January 10, 1967.]

Mr. Justice Fortas delivered the opinion of the Court.

Appellees were indicted under 18 U. S. C. § 371 for conspiring to violate § 215 (b) of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185 (b). The alleged conspiracy consisted of recruiting and arranging the travel to Cuba of 58 American citizens whose passports, although otherwise valid, were not specifically validated for travel to that country.[1]

The District Court granted appellees' motion to dismiss the indictment. Chief Judge Zavatt filed an exhaustive opinion (253 F. Supp. 433). Notice of direct appeal to this Court was filed and we noted probable jurisdiction under 18 U. S. C. § 3731 because the dismissal was "based upon the . . . construction of the statute upon which the indictment . . . is founded." We affirm. Our decision rests entirely upon our construction of the relevant statutes and regulations.

Two statutes are relevant to this case. The first is the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. § 211a. This is the general statute authorizing the Secretary of State to "grant and issue passports." It is not a criminal statute. The second statute is § 215 (b) of the Immigra-

[1] In response to a motion for a bill of particulars, the Government alleged that the individuals concerned possessed "unexpired and unrevoked United States passports which . . . had not been specifically validated by the Secretary of State for travel to Cuba."

tion and Nationality Act of 1952, *supra*, under which the present indictments were brought. Section 215 (b) was enacted on June 27, 1952. It is a re-enactment of the Act of May 22, 1918 (40 Stat. 559), and the Act of June 22, 1941 (55 Stat. 252). It provides that:

> "When the United States is at war or during the existence of any national emergency proclaimed by the President . . . and [when] the President shall find that the interests of the United States require that restrictions and prohibitions . . . be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, *it shall . . . be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.*" (Italics added.)

Wilful violation is subjected to a fine of not more than $5,000 or imprisonment for five years, or both.

On January 17, 1953, President Truman made the finding and proclamation required by § 215 (b).[2] As a consequence, a valid passport has been required for departure and entry of United States nationals from and into the United States and its territories, except as to areas specifically exempted by regulations. The Proclamation adopted the regulations which the Secretary of State had promulgated under the predecessors of § 215 (b) exempting from the passport requirement departure to or entry from "any country or territory in North, Central, or South America [including Cuba]." 22 Cir. CFR § 53.3 (b) (1958 rev.). On January 3, 1961, the United States broke diplomatic relations with

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[2] Proclamation No. 3004, 67 Stat. C 31, 3 CFR 180 (1949–1953 Comp.). The current "National Emergency" was proclaimed by President Truman on Dec. 16, 1950. Proclamation No. 2914, 64 Stat. A 454, 3 CFR 99 (1949–1953 Comp.).

Cuba. On January 16, 1961, the Deputy Under Secretary of State for Administration issued the "Excluding Cuba" amendment (22 CFR § 53.3 (1965 ed.), 26 Fed. Reg. 482). That amendment added the two words "excluding Cuba" to the phrase quoted above. Cuba was thereby included in the general requirement of a passport for departure from and entry into the United States.

On the same day, the Department of State also issued Public Notice 179, which stated that "Hereafter United States passports shall not be valid for travel to or in Cuba unless specially endorsed for such travel under the authority of the Secretary of State. . . ." 26 Fed. Reg. 492. It simultaneously issued a press release announcing that:

> ". . . *in view of the U. S. Government's inability,* following the break in diplomatic relations between the United States and Cuba, *to extend normal protective services to Americans visiting Cuba,* U. S. citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports . . . are being declared invalid for travel to Cuba unless specifically endorsed for such travel. . . . *These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.*"[1] (Italics added.)

In *Zemel* v. *Rusk*, 381 U. S. 1 (1965), the petitioner sought a declaratory judgment that the Secretary of State does not have statutory authorization to impose area restrictions on travel; that if the statute were con-

[1] State Department Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178. The full text is in the Appendix to this opinion.

strued to authorize the Secretary to do so, it would be an impermissible delegation of power; and that, in any event, the exercise of the power to restrict travel denied to petitioner his rights under the First and Fifth Amendments. This Court rejected petitioner's claims and sustained the Secretary's statutory power to refuse to validate passports for travel to Cuba. It found authority for area restrictions in the general passport authority vested in the Secretary of State by the 1926 Act, relying upon the successive "imposition of area restrictions during both times of war and periods of peace" before and after the enactment of the Act of 1926. 381 U. S., at 8–9. The Court specifically declined the Solicitor General's invitation to rule also that "travel in violation of an area restriction imposed on an otherwise valid passport is unlawful under the 1952 Act." *Id.*, at 12.[4]

We now confront that question. Section 215 (b) is a criminal statute. It must therefore be narrowly construed. *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96, 105 (1820) (Marshall, C. J.). Appellees urge that § 215 (b) must be read as a "border control" statute, requiring only that a citizen may not "depart from or enter" the United States without "a valid passport." On this basis, they argue, appellees did not conspire to violate the statute since all of those who went to Cuba departed and re-entered the United States bearing valid passports. Only if, as the Government urges, § 215 (b) can be given a broader meaning so as to encompass specific destination control—only if it is read as requiring the traveler to bear "a passport endorsed as valid for travel to the country for which he departs or from which he returns"—would appellees be guilty of any violation.

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[4] But cf. *United States* v. *Healy*, 376 U. S. 75, 83, n. 7 (1964).

We begin with the fact, conceded by the Government, that "Section 215 (b) does not, in so many words, prohibit violations of area restrictions; it speaks, as the district court noted in the *Laub* case . . . in the language of 'border control statutes regulating departure from and entry into the United States.'" Brief for the United States, p. 11. Nevertheless, the Government requests us to sustain this criminal prosecution and reverse the District Court on the ground that somehow, "the text is broad enough to encompass departures for geographically restricted areas . . . ." *Ibid.* We conclude, however, that in this criminal proceeding, the statute cannot be applied in this fashion. Even if ingenuity were able to find concealed in the text a basis for this criminal prosecution, factors which we must take into account, drawn from the history of the statute, would preclude such a reading.

Preliminarily, it is essential to recall the nature and function of the passport. A passport is a document identifying a citizen, in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers. See *Urtetique* v. *D'Arcy*, 9 Pet. 692, 699 (1835); *Kent* v. *Dulles*, 357 U. S. 116, 120–121 (1958); 3 Hackworth, Digest of International Law 435 (1942); 8 U. S. C. § 1101 (a)(30).

As this Court has observed, "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law. . . ." *Kent* v. *Dulles*, *supra*, 357 U. S., at 125. See *Aptheker* v. *Secretary of State*, 378 U. S. 500, 517 (1964); *Zemel* v. *Rusk*, 381 U. S. 1 (1965).

Under § 215 (b) and its predecessor statutes, Congress authorized the requirement that a citizen possess a passport for departure from and entry into the United

States,[5] and there is no doubt that with the adoption and promulgation of the "Excluding Cuba" regulation, a passport was required for departure from this country for Cuba and for entry into this country from Cuba. Departure for Cuba or entry from Cuba without a passport would be a violation of § 215 (b), exposing the traveler to the criminal penalties provided in that section. But it does not follow that travel to Cuba with a passport which is not specifically validated for that country is a criminal offense. Violation of the "area restriction"—"invalidating" passports for travel in or to Cuba and requiring specific validation of passports if they are to be valid for travel to or in Cuba—is quite a different matter from violation of the requirement of § 215 (b) and the regulations thereunder that a citizen bear a "valid passport" for departure from or entry into the United States.

The area restriction applicable to Cuba was promulgated by a "Public Notice" and a press release, *supra*, p. 3, neither of which referred to § 215 (b) or to criminal sanctions. On the contrary, the only reference to the statutory base of the announcement appears in the "Public Notice," and this is a reference to the nonpenal 1926 Act and the Executive Order adopted thereunder in 1938.[6] These merely authorize the Secretary of State to impose area restrictions incidental to his general

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[5] It is the exception rather than the rule in our history to require that citizens engaged in foreign travel should have a passport. *Kent v. Dulles*, 357 U. S. 116, 121–123 (1958); Jaffe, The Right To Travel: The Passport Problem, 35 Foreign Affairs 17 (1956).

[6] The "Public Notice" recites that "pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 FR 681, 687, 22 CFR 51.75 and 51.77) under authority of . . . the Act of . . . July 3, 1926 . . . all United States passports are hereby declared to be invalid for travel to or in Cuba. . . ." Department of State, Public Notice No. 179, Jan. 16, 1961, 26 Fed. Reg. 492.

powers with respect to passports. *Zemel* v. *Rusk*, *supra*. They do not purport to make travel to the designated area unlawful.

The press release issued by the Department of State at the time expressly explained the action as being "in view of the U. S. Government's inability . . . to extend normal protective services to Americans visiting Cuba." It explained that the action was taken in conformity with the Department's "normal practice" of limiting travel to countries with which we do not have diplomatic relations.[1] That "normal practice," as will be discussed, has not included criminal sanctions. In short, the relevant State Department promulgations are not only devoid of a suggestion that travel to Cuba without a specially validated passport is prohibited, or that such travel would be criminal conduct, but they also contain positive suggestions that the purpose and effect of the restriction were merely to make clear that the passport was not to be regarded by the traveler in Cuba as a voucher on the protective services normally afforded by the State Department.

This was in keeping with the unbroken tenor of State Department pronouncements on area restrictions. Prior to enactment of § 215 (b) on June 27, 1952, area travel restrictions were proclaimed on five occasions while the 1918 and 1941 Acts were in effect (1918–1921 and 1941–1953).[2] These were the predecessors of § 215(b), and

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[1] State Department, Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178. The full text is in the Appendix to this opinion.

[2] The 1918 Act was in effect by Presidential proclamation only between August 8, 1918, and March 3, 1921. (40 Stat. 1829 and 41 Stat. 1359.) The 1941 Act was in effect by successive Presidential proclamations and congressional extensions from November 14, 1941 (55 Stat. 1696) to April 1, 1953 (66 Stat. 57, 96, 137, 333), by which date § 215 (b) was already in effect by Presidential Proclamation No. 3004, Jan. 17, 1953, 67 Stat. C 31, 3 CFR § 180 (1949–1953 Comp.).

they similarly specified criminal sanctions.[9] But in each of the five instances, the area restrictions were devoid of any suggestion that they were related to the 1918 or 1941 Acts or were intended to invoke criminal penalties if they were disregarded. They were cast exclusively in civil terms, relating to the State Department's "safe passage" functions.[10] In two of these instances, the Department of State specifically emphasized the civil, nonprohibitory nature of the restrictions.[11] For example, in 1952 the State Department issued area restrictions with respect to Eastern European countries, China, and the Soviet Union. The Department's press release emphasized that the "invalidation" of passports for travel to those areas "in no way forbids American travel to those areas."[12]

Since enactment of § 215 (b), the State Department has announced area travel restrictions upon three occasions in addition to Cuba.[13] Again, although § 215 (b) was fully operative, none of these declarations purported to be issued under that section or referred to criminal

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[9] See p. 2, *supra*.

[10] 1. Restriction in 1919 as to Germany (3 Hackworth, Digest of International Law 530 (1942). 2. Restriction in 1950 as to Bulgaria and Hungary (22 Dept. State Bull. 399). 3. Restriction in 1951 as to Czechoslovakia (24 Dept. State Bull. 932). 4. Restriction in 1951 as to Hungary (26 Dept. State Bull. 7). 5. Restriction in 1952 as to East European countries, China, and the Soviet Union (26 Dept. State Bull. 736).

[11] These were the 1919 Germany restriction and the 1952 East Europe, Soviet Union, and China restriction. See n. 10, *supra*. The texts of the Department's announcements of these restrictions are in the Appendix to this opinion.

[12] See the Appendix to this opinion.

[13] 1. Restriction in 1955 to Albania, Bulgaria, China, North Korea, and North Viet Nam (33 Dept. State Bull. 777). 2. Restriction in 1956 as to Hungary (34 Dept. State Bull. 248). 3. Restriction in 1956 as to Egypt, Israel, Jordan, and Syria (35 Dept. State Bull. 756, 21 Fed. Reg. 8577).

sanctions. Each of them, like the Cuba regulation, sounded in terms of withdrawal of the safe-passage services of the State Department.[14]

In 1957, the Senate Foreign Relations Committee asked the Department: "What does it mean when a passport is stamped 'not valid to go to country X'?" After three months, the Department sent its official reply. It stated that this stamping of a passport "means that if the bearer enters country X he *cannot be assured of the protection* of the United States. . . . [but it] *does not necessarily mean that if the bearer travels to country X he will be violating the criminal law.*"[15] (Italics added.) Similarly, in hearings before another Senate Committee, a Department official explained that when a passport is marked "invalid" for travel to stated countries, this means that "this Government is not sponsoring the entry of the individual into those countries and does not give him permission to go in there under the protection of this Government."[16]

Although Department records show that approximately 600 persons have violated area travel restrictions since the enactment of § 215 (b),[17] the present prosecutions

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[14] In the 1956 area restriction relating to Egypt, Israel, Jordan, and Syria, *supra*, n. 13, as well as the Cuba restriction, the Department expressly recited the 1926 Act as its basis. It did not mention § 215 (b). 21 Fed. Reg. 8577.

[15] Hearings before the Committee on Foreign Relations, United States Senate, on Department of State Passport Policies, 85th Cong., 1st Sess. (1957), p. 59.

[16] Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, on the Right To Travel, 85th Cong., 1st Sess., part 2 (1957), p. 86; see also *id.*, at p. 62.

[17] The Government conceded this to the court below. See also the Department's testimony to the same effect in Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Committee on the Judiciary, United States Senate, S. 3243, 89th Cong., 2d Sess. (1966),

are the only attempts to convict persons for alleged area transgressions.[18]

Until these indictments, in fact, the State Department had consistently taken the position that there was no statute which imposed or authorized such prohibition. In the 1957 hearings, referred to above, the Acting Director of the Bureau of Security and Consular Affairs, Department of State, testified that he knew of no statute providing a penalty for going to a country covered by an area restriction without a passport (as distinguished from departing or entering the United States).[19] The Government, as well as others, has repeatedly called to the attention of the Congress the need for consideration of legislation specifically making it a criminal offense for any citizen to travel to a country as to which an area restriction is in effect,[20] but no such legislation was enacted.[21]

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p. 43. The Chief of the Security Branch of the Legal Division of the State Department testified to the court below that he was unaware of any prosecution for violation of area restrictions under the predecessors of § 215 (b).

[18] See also *Travis* v. *United States*, No. 67, *post*; *Worthy* v. *United States*, 328 F. 2d 386 (C. A. 5th Cir., 1964).

[19] Hearings, n. 16 *supra*, at pp. 91–95.

[20] See, *e. g.*, President Eisenhower's request for legislation, H. R. Doc. No. 417, 85th Cong., 2d Sess. (1958). The Administration's bill was S. 4110, H. R. 13318. In 1957, the Commission on Government Security, specifically established by Congress to study travel and passport legislation, among other things (Public Law 304, 84th Cong., 1st Sess., 69 Stat. 595 (1955)), recommended that "Title 8, U. S. C. A., section 1185 (b), should be amended to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid." Report, at p. 475. The next year, the Special Committee To Study Passport Procedures of the Association of the Bar of the City of New York published a report entitled "Freedom To Travel." One of the authors of this Report was the Honorable Adrian S. Fisher, former

[*Footnote 21 on p. 11.*]

In view of this overwhelming evidence that § 215 (b) does not authorize area restrictions, we agree with the District Court that the indictment herein does not allege a crime. If there is a gap in the law, the right and the duty, if any, to fill it do not devolve upon the courts. The area travel restriction, requiring special validation of passports for travel to Cuba, was a valid civil regulation under the 1926 Act. *Zemel* v. *Rusk*, *supra*. But it was not and was not intended or represented to be an exercise of authority under § 215 (b), which provides the basis of the criminal charge in this case.

Crimes are not to be created by inference. They may not be constructed *nunc pro tunc*. Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. As this Court said in *Raley* v. *Ohio*, 360 U. S. 423, 438, we may not convict "a citizen for exercising a privilege which the State clearly had told him was available to him." As *Raley* emphasized, criminal sanctions are not supportable if they are to be imposed under "vague and undefined" commands (citing *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1959)); or if they

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Legal Advisor to the Department of State. This Report concluded, at p. 70, as to criminal enforcement of area restrictions:

"The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case."

[21] The most recent bill, introduced by the Department after two years of study, was H. R. 14895, 89th Cong., 2d Sess. (1966). See Hearings before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Committee on the Judiciary, United States Senate, S. 3243, 89th Cong., 2d Sess. (1966), p. 73. Some of the other bills which failed in Congress are discussed in the opinion of the court below.

are "inexplicably contradictory" (citing *United States* v. *Cardiff*, 344 U. S. 174 (1952)); and certainly not if the Government's conduct constitutes "active misleading" (citing *Johnson* v. *United States*, 318 U. S. 189, 197 (1943)).

In view of our decision that appellees were charged with conspiracy to violate a nonexistent criminal prohibition, we need not consider other issues which the case presents.

Accordingly, the judgment of the District Court is

Affirmed.

APPENDIX.

The following three Department of State statements in connection with area restrictions are referred to in the foregoing opinion:

(1) State Department Press Release No. 24, Jan. 16, 1961, 44 Dept. State Bull. 178:

"The Department of State announced on January 16 that in view of the U. S. Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, U. S. citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of U. S. citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

"The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

"Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the U. S. Immigration and Naturalization Service.

"Federal regulations are being amended to put these requirements into effect.

"These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations."

(2) State Department Press Release No. 341, May 1, 1952, 26 Dept. State Bull. 736:

"The Department of State announced on May 1 that it was taking additional steps to warn American citizens of the risk of travel in Iron Curtain countries by stamping all passports not valid for travel in those countries unless specifically endorsed by the Department of State for such travel.

"In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas. It contemplates that American citizens will consult the Department or the Consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized.

"All new passports will be stamped as follows: 'THIS PASSPORT IS NOT VALID FOR TRAVEL TO ALBANIA, BULGARIA, CHINA, CZECHOSLOVAKIA, HUNGARY, POLAND, ROUMANIA OR THE UNION OF SOVIET SOCIALIST REPUBLICS UNLESS SPECIFICALLY ENDORSED UNDER AUTHORITY OF THE DEPARTMENT OF STATE AS BEING VALID FOR SUCH TRAVEL.

"All outstanding passports, which are equally subject to this restriction, will be so endorsed as occasion permits."

"Freedom to Travel," a 1958 Report of The Special Committee To Study Passport Procedures of the Association of the Bar of the City of New York, characterized this as "an honest admission of the lack of statutory power to enforce an area restriction of this nature." *Id.*, at p. 70. The Department gave a practical construction of this area restriction in 1954 when it informed two

newsmen desiring to travel to Bulgaria that they could go there without a passport and "use, as a travel document . . . an affidavit in lieu of a passport," and that, if Bulgaria would permit them entry, "the Department . . . would hold no objection." Hearings on Department of State Passport Policy before the Committee on Foreign Relations, United States Senate, 85th Cong., 1st Sess. (1957), p. 65.

(3) 3 Hackworth, Digest of International Law 530 (1942) (1919 Germany restriction):

> "The Department is not now issuing or authorizing issuance or amendment of passports for Germany. However, the Department interposes no objection to the entry into Germany of Americans who have important and urgent business to transact there. In view of the present situation, such persons should understand that they go upon their own responsibility and at their own risk. They cannot be guaranteed the same protection which they might expect under normal conditions."